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No. 01-835-CFX Title: Sao Paulo State of the Federative Republic of Brazil, Petitioner
v.
American Tobacco Co., Inc., et al.

Docketed:
December 5, 2001 Court: United States Court of Appeals for the Fifth Circuit

Entry	Date	Proceedings and Orders
	Dec 4 2001	Petition for writ of certiorari filed. (Response due February 1, 2002)
	Dec 13 2001	Order extending time to file response to petition until February 1, 2002.
	Dec 13 2001	This extension is granted for all respondents.
	Jan 31 2002	Brief of respondents American Tobacco Co., et al. in opposition filed.
	Feb 6 2002	DISTRIBUTED for Conference of February 22, 2002
	Feb 6 2002	Reply brief of petitioner Sao Paulo State of the Federative Republic of Brazil filed.
	Feb 25 2002	REDISTRIBUTED for Conference of March 1, 2002
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	Apr 1 2002	Petition GRANTED. Judgment REVERSED and case REMANDED Opinion per curiam. (Detached opinion.)
		**********
	May 1 2002	JUDGMENT ISSUED.

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(1)

No. 01-__

IN THE

Supreme Court of the United States

Sao Paulo State
of the Federative Republic of Brazil,
Petitioner,

v.

The American Tobacco Co., Inc., *et al.*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fifth Circuit held that the district judge in this tobacco products liability suit abused his discretion in declining to disqualify himself. The panel reasoned that nearly a decade before, while the district judge was in private practice, his name had been mistakenly listed, along with that of one of the plaintiff's attorneys in this case, on a voluntary bar association's three-sentence *pro forma* motion to file an *amicus* brief in a different tobacco suit in state court. The panel explicitly gave no weight to critical uncontested facts, including particularly that the judge's name had been listed by someone else by *mistake* and that he had never had anything to do with the case in which the motion was filed. In addition, (i) the motion said nothing about the merits of tobacco litigation; and (ii) the judge had never been involved in any tobacco litigation nor litigated any matter with plaintiff's counsel during his entire three-decade career as a private attorney.

In "vigorously" dissenting from the Fifth Circuit's denial of rehearing *en banc* by an evenly divided vote, six judges wrote that the panel's decision "disregards the unanimous voices of other U.S. Courts of Appeals that have addressed the issue," "dangerously erodes the discretion that Congress has assigned to federal judges in matters of recusal while opening a new, broad avenue for litigants to avoid appearing before a judge they perceive to be unfairly disinclined to favor their side in this case," and presents an issue that "cuts across ideology, politics, and judicial philosophy."

The Question Presented is:

Did the Fifth Circuit err in adopting a new legal standard for recusal that, whenever a district judge is mistakenly asserted to have had a "pre-judicial association" with a position or counsel, the judge's failure to disqualify himself is an abuse of discretion as a matter of law because a third party "might" erroneously perceive the judge as biased?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties listed in the caption, the following parties were defendants-appellants in the court of appeals and are Respondents here: Fortune Brands, Inc. (formerly known as American Brands, Inc.); R J Reynolds Tobacco Co.; Brown & Williamson Tobacco Corp., individually and as successor by merger to The American Tobacco Co.; BATUS, Inc.; BATUS Holdings, Inc.; Phillip Morris, Inc.; Phillip Morris Companies, Inc.; Lorillard Tobacco Co.; Liggett Group, Inc.; The Tobacco Institute, Inc.; Quaglino Tobacco and Candy Co., Inc.; and J & R Vending Services, Inc.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The District Court's opinion (Pet. App. 40a-47a) (Barbier, J.) is unreported. The Fifth Circuit's per curiam opinion reversing (Pet. App. 17a-25a) (Garza and Stewart, JJ.; Parker, J., specially concurring) is published at 250 F.3d 315. The court of appeals' order denying rehearing and rehearing *en banc* (Pet. App. 1a-16a) (dissent per Wiener and Parker, JJ., jointly, joined by King, C.J., and Higginbotham, Davis, and Dennis, JJ.) is published at 265 F.3d 299.

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 455(a) provides: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

JURISDICTION

The panel entered its opinion on May 14, 2001, and the court denied rehearing and rehearing *en banc* on September 5, 2001. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATEMENT

This case presents a question of profound importance that merits certiorari both because it raises square conflicts with decisions of this Court and other circuits and because it directly implicates this Court's supervisory responsibility for the federal judiciary. The Fifth Circuit – departing radically from decades of uninterrupted precedent in other circuits – held that a judge abuses his discretion as a matter of law by not disqualifying himself whenever he is *mistakenly* believed to have a pre-judicial association with a particular legal position relevant to the case or a party's lawyer. The court of appeals reasoned that, in these circumstances, a member of the public "might" erroneously doubt the judge's impartiality.

As six judges explained at length in dissenting from the denial of rehearing *en banc*, the legal basis for such an extraordinary holding has been uniformly rejected by other circuits and, indeed, stands alone in "the history of American jurisprudence." Pet. App. 4a.

I. Proceedings in the District Court

Petitioner Sao Paulo State of the Federative Republic of Brazil ("Petitioner") originally filed this tobacco products liability suit in Louisiana state court in February 2000. The next month, the defendant tobacco companies ("Respondents") removed the case to the United States District Court for the Eastern District of Louisiana, where it was randomly assigned to District Judge Barbier. Petitioner promptly moved to remand the case to state court. Respondents moved to stay the case pending a determination by the panel on multidistrict litigation whether the case should be transferred to another district court as a "tag along" matter.

Respondents also moved to disqualify Judge Barbier on the same ground they had invoked in a parallel suit brought against them by the Republic of Panama. Respondents argued that eight years earlier, while the judge was in private practice, his name had appeared on a *pro forma*, three-sentence motion to file an *amicus curiae* brief in the Louisiana Supreme Court. See Pet. App. 55a-58a (reproducing the *amicus* motion). (For ease of understanding, we henceforth refer to the present case as the "*Sao Paulo* case," the Panama matter as the "*Panama* case," and the Louisiana state court suit as the "*Gilboy* case.") The *amicus* motion in *Gilboy* was filed by the Louisiana Trial Lawyers Association ("LTLA") and listed ten lawyers, including Barbier (erroneously identified as the President of the LTLA) and Michael St. Martin (one of the plaintiff's lawyers in this case). The motion said nothing at all about the merits of the *Gilboy* case. The *amicus* brief itself – on which Judge Barbier's name was not listed – argued that the tobacco

industry should be held liable for deaths caused by lung cancer, arguments that were similar to those underlying the plaintiff's claims in the *Sao Paulo* case.

Respondents did not maintain that Judge Barbier was biased against them. *E.g.*, Resp. Opp. to Rh'g En Banc 2 ("No claim or finding of actual bias was made."). Nor did Respondents maintain that the presence of Judge Barbier's name on the *Gilboy* motion implicated any of the provisions of 28 U.S.C. § 455(b), including particularly Section 455(b)(2), which requires disqualification when the judge "served as [a] lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter." Rather, Respondents maintained that Judge Barbier's involvement in the case created an "appearance of impropriety" that required disqualification under 28 U.S.C. § 455(a).

Judge Barbier, having previously denied the motion to disqualify in the *Panama* case, also denied the motion in the *Sao Paulo* case. See Pet. App. 43a (incorporating reasoning from district court's ruling in *Panama*). The Judge detailed "for the record" six reasons why there was no "appearance of impropriety" (see generally *id.* 48a-54a):

First, his name had been "mistakenly" placed on the *Gilboy amicus* motion without his knowledge or permission by some unknown person at the LTLA at a time when he "was not the president of the Louisiana Trial Lawyers Association," "having left that office in September [or] October of the previous year";

Second, he "had absolutely nothing to do with researching, writing, signing or approving this brief in any manner";

Third, his name appeared "on the motion for leave to file the *amicus* brief, not on the brief itself," which was the only document that contained assertions about the merits of tobacco litigation;

Fourth, he had "absolutely no personal knowledge of any of the disputed or alleged facts in the *Gilboy* case[;] None[;] Period," and indeed he could not even say "what the holding was in that case, what the real issue was";

Fifth, he had "never taken or expressed any position or opinion regarding the tobacco industry or any of the issues raised in this litigation"; and

Sixth, he had "never been associated in legal practice or in any case with any of the other lawyers listed [on the *Gilboy* motion] or the lawyers in this case."

Judge Barbier furthermore explained that, even putting those six undisputed facts to the side, accepting Respondents' argument that disqualification is required in any case of prejudicial association with a particular legal position "would open the door to Pandora's box." Pet. App. 54a. "[A]fter practicing law for 28 or 29 years, I have taken many different positions on different legal issues that, I guess, any party in any case could find a brief or a lawsuit or a memoranda that I filed somewhere along the way, and if they thought it conflicted with a position involving their client in a case now, that would open every judge in this court to recusal on a Pandora's box of issues." *Id.*

Having previously remanded the *Panama* case to state court, the Judge also remanded the *Sao Paulo* case. Pet. App. 44a-47a. The judge also denied Respondents' request that he stay the case pending a determination by the panel on multidistrict litigation whether the *Sao Paulo* case should be deemed a "tag along" case and therefore transferred. *Id.* 41a-43a. Judge Barbier explained that the MDL panel had made clear that district courts should act on pending motions (such as Petitioner's remand motion) rather than awaiting the panel's procedural rulings, and that even "defendants in their papers filed with the Court seem to grudgingly acknowledge that the foregoing is the law." *Id.* 42a.

II. Proceedings Before the Fifth Circuit Panel

Respondents could not appeal the district court's remand order. See 28 U.S.C. § 1447. They nonetheless appealed Judge Barbier's denial of their disqualification motion, asserting that the district court's subsequent remand order was void on that basis. While that appeal was pending, a panel of the Fifth Circuit reversed Judge Barbier's refusal to disqualify himself in the *Panama* case. See Pet. App. 29a-37a. Two of the same judges were assigned to the *Sao Paulo* appeal, and they reversed on the basis of their prior *Panama* ruling. See *id.* 19a. The third judge concurred on the ground that *Panama* was binding precedent but called on the full court to overrule that decision. See *id.* 20a-25a. On remand, the case was reassigned, at which point it was not remanded to state court but instead was transferred by the panel on multidistrict litigation to the District Court for the District of Columbia, where it is still pending.

The *Panama* decision holds that Judge Barbier abused his discretion in not disqualifying himself because his name was on the *Gilboy amicus* motion along with the name of one of Petitioner's counsel. Addressing the *Gilboy amicus* brief, the panel acknowledged that "the facts of the [*Gilboy*] suit and the present suit may be distinguishable." Pet. App. 35a. The panel noted, however, that the LTLA's *amicus* brief "contained general statements about tobacco companies" – particularly that "tobacco use is addictive" and that "tobacco companies should be held liable because they were negligent" – that are "similar[]" to the assertions underlying the complaints in the *Panama* and *Sao Paulo* cases. *Id.*

The panel set out its legal standard as follows: "In the present case, while there is no evidence of actual bias, we must consider whether a reasonable person *might* harbor doubts about the trial judge's impartiality." Pet. App. 36a (emphasis added). Under that lenient standard, the court concluded that the judge's refusal to disqualify himself violated Section 455(a):

> The fact that Judge Barbier's name was listed on a motion to file an amicus brief which asserted similar allegations against tobacco companies to the ones made in this case may lead a reasonable person to doubt his impartiality. Also, Judge Barbier was listed on this filing with the attorney who is currently representing the Republic of Panama.

Id. The panel furthermore concluded that this supposed violation of Section 455(a) was *per se* an abuse of discretion: "[W]e hold that a reasonable person *might* harbor doubts about the trial judge's impartiality, and *thus* the district court *abused its discretion* in denying the defendants' motion to recuse." *Id.* 37a (emphasis added).

Significantly, the court gave no weight to any factors other than those underlying Respondents' allegations of an appearance of bias. The panel acknowledged Judge Barbier's uncontested, on-the-record representations that his name had been "placed on the motion by mistake" and that "his term as president of LTLA had ended by the time the brief was filed, and that he had nothing to do with the researching, writing, signing, or approval of the brief." Pet. App. 35a. But the court concluded that these uncontested representations "do not dissipate the doubts that a reasonable person would probably have about the court's impartiality." *Id.* 36a. The court also gave no weight to the fact that, for example, Judge Barbier had never been involved in tobacco litigation in his entire career and that the motion had been filed nearly a decade ago. See *supra* at 3-4.

The panel acknowledged that it could not identify any decision that had required recusal in similar circumstances, but it nonetheless held that Judge Barbier's decision was an abuse of discretion in light of *Bradshaw* v. *McCotter*, 785 F.2d 1327, *modified on reh'g*, 796 F.2d 100 (CA5 1986). See Pet. App. 35a-36a. *Bradshaw* held on federal habeas that a criminal defendant's right to due process was implicated when his state appeal was heard by a panel that included a

judge who had until very recently served as the State Prosecuting Attorney and whose name appeared as counsel for the State in the defendant's *own appeal*. The judge had not in fact worked on the defendant's case. The Fifth Circuit held, however, that "[t]he appearance of [the judge's] name on the prosecuting attorney's brief undermined a fundamental aspect of our criminal justice system: a judge's neutrality. The separation between the roles of prosecutor and judge must be certain and inflexible." 785 F.2d at 1329.

The panel in the *Panama* case conceded that, even under its lenient legal standard, "this is a close case for recusal." Pet. App. 36a. But it determined that "if the question of whether § 455(a) requires disqualification is a close one the balance tips in favor of recusal." *Id.* The panel accordingly reversed the denial of the motion to disqualify and, on that basis, vacated the district court's order remanding the case to state court. *Id.* 39a.[1]

[1] The Fifth Circuit correctly did not accept Respondents' contention that other factors supposedly bolstered the basis for requiring disqualification. Although Respondents argued that the arguments in the LTLA *amicus* brief were inflammatory and closely related to those in the *Panama* and *Sao Paulo* cases, the panel correctly recognized that *Gilboy* "may be distinguishable" and merely contained "general statements" that are "similar" to the allegations in this case. Pet. App. 35a-36a. The Fifth Circuit also did not accept Respondents' reliance on the fact that some of the defendant tobacco companies here were also defendants in *Gilboy*, no doubt because the same defendants are named in essentially every tobacco suit and no special allegations were made as to the overlapping defendants. The panel did not rely on the allegation that Judge Barbier was an officer of the LTLA when the *Gilboy amicus* brief was filed, reasoning that would impute disqualification to every judge who previously served as an officer of any association that took a substantive position. Finally, the panel did not accept Respondents' inexplicable contention that disqualification is required on the basis of any pre-judicial position taken in the course of *pro bono* service rather than paid representation. Because the Fifth Circuit did not rely on those contentions, they are not relevant to the legal conflicts created by the decision below and accordingly will not be discussed further.

Judge Parker concurred specially in this case to argue that, although the *Panama* decision was controlling precedent within the Fifth Circuit, it "was wrongly decided" and should be reversed *en banc*. Pet. App. 20a. He concluded that the facts on the public record "are simply too tenuous to support any reasonable basis for questioning the judge's impartiality, and even if these facts clearly raise the issue of impartiality, it is error to conclude that the judge abused his sound discretion in denying the motion for recusal." *Id.* Judge Parker also explained that the panel's decision conflicts with decisions of the Third, Fourth, and Eleventh Circuits, as well as with considered opinions written by the Chief Justice and Judge Posner concluding that their own recusals were not required in analogous circumstances. *Id.* 21a-25a.

III. Dissent from the Denial of Rehearing *En Banc*

Notwithstanding Judge Parker's clear identification of the conflicts created by the panel's decision, Petitioner's suggestion of rehearing *en banc* failed by an evenly divided vote. Pet. App. 3a. In a joint opinion by Judges Wiener and Parker, six judges wrote to "respectfully but vigorously dissent." *Id.* 4a. The dissenters set forth their views at length "not merely because [they viewed] the panel opinion as wrongly decided, but because the nature of the error committed * * * dangerously erodes the discretion that Congress has assigned to federal judges in matters of recusal while opening a new, broad avenue for litigants to avoid appearing before a judge they perceive to be unfairly disinclined to favor their side of the case." *Id.* 4a-5a.

The dissenters explained that the panel majority's legal holding rested on the proposition "that any judge who had a 'pre-judicial association with the position' – not with the parties, not with the lawyers, but with a 'position' – can never fairly decide a case that raises questions pertaining to that 'position.'" Pet. App. 8a. Such a holding "clearly called into question the oath we take when we become federal judges" and furthermore logically "launch[ed] a cottage industry in

which investigators will comb the contents of speeches made, articles written, and pleadings and briefs filed by a judge prior to his taking of that oath, looking for some trace of evidence suggesting that, prior to his judgeship, the judge held views on legal questions that can be used to disqualify him from hearing cases that implicate such matters." *Id.* 9a.

Amplifying Judge Parker's prior panel concurrence, the dissenters explained that "the panel opinion disregards the unanimous voices of other U.S. Courts of Appeals that have addressed the issue." Pet. App. 13a. In particular, the decision conflicted with rulings of the Third, Seventh, Ninth, and Eleventh Circuits, as well as the recusal opinions of the Chief Justice and Judge Posner. *Id.* 13a-15a.

Finding "no legitimate basis for disturbing the Judge's exercise of discretion in this case," the dissenters closed with an emphatic statement of the importance of the question presented, particularly with respect to the court's adoption of the principle of "issue recusal":

> We are satisfied that this issue cuts across ideology, politics, and judicial philosophy, and that it has the potential for undermining the independence of the federal judiciary. No existing jurisprudence supports, much less requires, recusal of a judge who, years before taking the judicial oath, had expressed an opinion on an issue of law, or had represented the same or a related party, or had belonged to and held office in an organization that advocated a particular view of public policy or legal interpretation. Never before has *any court* accepted "issue recusal" as a ground for reversing a judge who in his own exercise of discretion, concluded that his recusal was not required. The panel decision that this court has refused to rehear en banc sets an alarming precedent by doing precisely that, and trivializes our oath in the process.

Pet. App. 16a (emphasis added).[2]

REASONS FOR GRANTING THE WRIT

Certiorari is warranted in this case on several grounds.

I. The decision below conflicts with two of this Court's precedents. *First*, *Liteky* v. *United States*, 510 U.S. 540 (1994), holds that Section 455(a) must not be read "as implicitly eliminating a limitation explicitly set forth in § 455(b)." 510 U.S. at 553. The Fifth Circuit's decision, however, contravenes that rule. Section 455(b)(2) provides that recusal is required when the judge, while in private practice, "served as [a] lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter." Although Respondents' allegations are similar to those covered by Section 455(b)(2), there is no dispute that Judge Barbier's recusal is not required under that provision because *Gilboy* is not "the matter in controversy," Judge Barbier did not actually "serve[] as [a] lawyer" in *Gilboy*, and Judge Barbier did not "previously practice[] law" with any of the plaintiff's counsel in this case. The Fifth Circuit's decision, however, reads Section 455(a) to require recusal so broadly that henceforth no party will ever resort to Section 455(b)(2). Furthermore, the Fifth Circuit's holding that disqualification is mandatory based even on the extraordinarily attenuated allegations in this case cannot be reconciled with *Liteky*'s holding that Section 455(a) does not demand a "sort of 'child-like innocence'" from district judges (510 U.S. at 552).

Second, *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988), holds that disqualification is required under Section 455(a) only if "the public might reasonably believe" that the judge "knew of facts creating an

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[2] As if to illustrate the point that this issue "cuts across ideology, politics, and judicial philosophy" (Pet. App. 16a), the dissenters' opinion was issued jointly by appointees of Presidents Bush and Clinton and was joined by appointees of Presidents Carter, Reagan, and Clinton.

appearance of impropriety." No member of the public could possibly reach that conclusion in this case because any person who considered the matter would know that Judge Barbier had never been involved in *Gilboy* or any other tobacco products liability case.

The decision below furthermore conflicts with *Liljeberg*'s holding that, even once a violation of Section 455(a) is identified, the court of appeals must consider whether that violation is "harmless error." 486 U.S. at 862. If a violation of Section 455(a) was ever harmless, this one was. The alleged "appearance of impropriety" in this case was said to arise from Judge Barbier's deciding the merits of a tobacco products liability case. But Judge Barbier *never considered the merits*. He only considered one question: whether to remand to state court or instead to stay the case until a ruling by the panel on multidistrict litigation. The Fifth Circuit's decision only served to vacate Judge Barbier's remand order. Respondents' disqualification motion thus did not further Section 455(a)'s purpose of preserving public confidence in the judicial process, but rather served only to *manipulate* that process by circumventing the statutory prohibition on appealing remand decisions.

II. Certiorari is also warranted because the decision below conflicts with decisions of other circuits, which categorically reject three legal propositions embraced by the Fifth Circuit. *First*, several courts of appeals have squarely held that Section 455(a) is not implicated when the request for recusal rests on false information and the judge has set forth the actual facts on the record. Those courts reason that Section 455 requires an inquiry into the view that a "reasonable person" would have if that person knew "all the *facts*." In those circuits, the denial of recusal in this case would have been affirmed because Judge Barbier clearly explained for the record that the allegations supposedly giving rise to an appearance of impropriety are false.

Second, several circuits have squarely rejected the Fifth Circuit's holding that a judge's "pre-judicial association" with a "position" requires disqualification. Those courts reason that a breadth of pre-judicial experience is a virtue, not a vice, and that the public recognizes that judges will abide by their solemn oaths to decide cases without bias or predisposition. In those circuits, the denial of recusal in this case would have been affirmed (even if Judge Barbier *had* been involved in *Gilboy*) because his participation in a single tobacco suit almost a decade earlier could not reasonably be said to call his impartiality into question.

Third, several circuits reject the exceedingly lenient legal standard adopted by the Fifth Circuit for holding that Section 455(a) is violated and that the failure to remedy the violation is an abuse of discretion – *viz.*, that "a reasonable person *might* harbor doubts about [the judge's] impartiality." Pet. App. 36a (emphasis added). A number of circuits hold that Section 455(a) is not implicated unless a reasonable person actually "*would*" have such doubts. In addition, several circuits impose a still more stringent test in appeals that (like this one) are subject to the "abuse of discretion" standard of review, requiring that the district judge's failure to disqualify himself constitute at least a "clear error of judgment." There can be no dispute that these conflicting legal standards are outcome determinative here because the panel majority conceded that even under its sweeping legal test "this is a close case for recusal" (Pet. App. 36a).

III. These clear conflicts refute any suggestion that the question presented is fact-bound and unlikely to recur. Similar allegations could arise in any case on any subject. To be sure, every case involving Section 455 is, in one sense, "extremely fact intensive and fact bound." Pet. App. 34a. But that is simply another way of saying that careful attention must be paid to the facts supposedly requiring disqualification; it does *not* mean that no case involving disqualification ever merits review in this Court. To the contrary, certiorari is warranted here because the circuits have

adopted irreconcilable legal standards under Section 455, such that their analysis of the same facts would produce conflicting results. Particularly given that the court of appeals refused to reverse its decision notwithstanding the clear legal conflicts identified by six dissenting judges, the Fifth Circuit is plainly committed to charting its own course with its exceedingly expansive approach to judicial disqualification.

Nor can it reasonably be disputed that the decision below will, at the least, invite a substantial disruption of the judicial process. In light of the Fifth Circuit's holding that Judge Barbier abused his discretion in declining to recuse himself on these extremely attenuated allegations, litigants know that much more common circumstances – such as when the judge actually participated in related litigation or expressed views on the subject of the case – will *a fortiori* require disqualification. As six judges correctly predicted in dissenting from the denial of rehearing *en banc*, the Fifth Circuit's precedent "launch[es] a cottage industry in which investigators will comb the contents of speeches made, articles written, and pleadings and briefs filed by a judge prior to his taking of [the] oath, looking for some trace of evidence suggesting that, prior to his judgeship, the judge held views on legal questions that can be used to disqualify him from hearing cases that implicate such matters." Pet. App. 9a. Judge Barbier was no doubt correct in similarly describing Respondents' position as opening "Pandora's box." *Id.* 54a.

Certiorari accordingly should be granted.

I. The Decision Below Conflicts With This Court's Precedents.

A. *Liteky* v. *United States*

In *Liteky* v. *United States*, 510 U.S. 540 (1994), this Court held that Section 455(a) incorporates the "extra-judicial source doctrine" that a demand for disqualification must rest on factors unrelated to the judicial proceedings. The Court's decision rested substantially on the relationship between

Sections 455(a) and (b). The extra-judicial source doctrine applies under Section 455(b)(1), which applies in cases of "personal bias or prejudice concerning a party." This Court reasoned that "[d]eclining to find in the language of § 455(a) a limitation which (petitioners acknowledge) is contained in the language of § 455(b)(1) would cause the statute, in a significant sense, to contradict itself":

> As we have described, § 455(a) expands the protection of § 455(b), but duplicates some of its protection as well – not only with regard to bias and prejudice but also with regard to interest and relationship. Within the area of overlap, it is unreasonable to interpret § 455(a) (unless the language requires it) as implicitly eliminating a limitation explicitly set forth in § 455(b). It would obviously be wrong, for example, to hold that "impartiality could reasonably be questioned" simply because one of the parties is in the fourth degree of relationship to the judge. Section 455(b)(5), which addresses the matter of relationship specifically, ends the disability at the third degree of relationship, and that should obviously govern for purposes of § 455(a) as well. Similarly, § 455(b)(1), which addresses the matter of personal bias and prejudice specifically, contains the "extra-judicial source" limitation – and that limitation (since nothing in the text contradicts it) should govern for purposes of § 455(a) as well.

510 U.S. at 552-53. In an accompanying footnote, the Court reiterated that "when one of those aspects addressed in (b) is at issue, it is poor statutory construction to interpret (a) as nullifying the limitations (b) provides, except to the extent the text requires." *Id.* at 553 n.2.[3]

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[3] For other decisions recognizing this relationship between Sections 455(a) and (b), see, *e.g.*, *Ven eklase* v. *City of Fargo*, 236 F.3d 899, 901-02 (CA8 2000) (opinion of Bye, J., respecting recusal); *Herrington* v. *County of Sonoma*, 834 F.2d 1488, 1501-03 (CA9 1987); *United States* v. *Sibla*, 624 F.2d 864, 867-69 (CA9 1980).

The Fifth Circuit's decision in this case construes Section 455(a) in exactly the manner that *Liteky* expressly disapproves. Congress addressed the circumstances in which an appearance of impropriety would arise from a pre-judicial participation in litigation or association with counsel – precisely the concerns raised by Respondents' disqualification motion – in Section 455(b)(2), which requires recusal when the judge while "in private practice • • • served as [a] lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter." The Fifth Circuit, however, has construed Section 455(a) "as implicitly eliminating a limitation explicitly set forth in § 455(b)" (*Liteky*, 510 U.S. at 553) because Respondents' allegations fail to trigger Section 455(b)(2) in three independent respects: *Gilboy* is not "the matter in controversy" here; Judge Barbier did not actually "serve[] as [a] lawyer" in *Gilboy*; and Judge Barbier did not "previously practice[] law" with any of the plaintiff's counsel in this case. The Fifth Circuit nonetheless read such extraordinary breadth into Section 455(a) that henceforth no party will ever have cause to invoke Section 455(b)(2). According to the decision below, Section 455(a) mandates disqualification whenever the district judge participated in a case with "similar" allegations (as opposed to the same case) and served as co-counsel with a party's lawyer (as opposed to in the same law firm). Moreover, under the Fifth Circuit's holding, disqualification is required even when the public record shows that the allegation of pre-judicial participation is *false*, a circumstance that would not trigger Section 455(b). *Liteky* instructs that Congress could not have intended to obliterate the limitations of Section 455(b) in that fashion.

The decision below is furthermore inconsistent with this Court's conclusion in *Liteky* that Section 455(a) limits the scope of the judicial disqualification because it applies only when the judge's impartiality could reasonably be questioned. The plain meaning of "partiality," the Court explained, carries an important "pejorative connotation." 510 U.S. at 552.

"'Partiality' does not refer to all favoritism, but only to such as is, for some reason, wrongful or inappropriate. Impartiality is not gullibility." *Id.* The term "reasonableness" carries the same connotation because it would be "unreasonable" to require judges to exhibit a "sort of 'child-like innocence.'" *Id.* Justice Kennedy, in a concurring opinion for himself and Justices Blackmun, Stevens, and Souter, similarly expressed the view that Section 455(a) must be construed narrowly: "I think all would agree that a high threshold is required to satisfy this standard. Thus, under § 455(a), a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute." 510 U.S. at 558. The Fifth Circuit's holding that Judge Barbier abused his discretion in refusing to disqualify himself in this case, however, rests on an extraordinarily attenuated relationship between the *Gilboy amicus* brief, in which Judge Barbier was not actually involved and which was filed almost a decade earlier, and this case. Finding disqualification on these facts demands precisely the "child-like innocence" that *Liteky* holds is not required by the statute.

B. *Liljeberg v. Health Services Acquisition Corp.*

In *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847 (1988), this Court held that an egregious violation of Section 455(a) required that a district court's judgment be vacated so long as the judge should have known of the facts giving rise to the appearance of bias. The Court concluded that, although Section 455(a) did not require that the judge "actually knew of facts creating an appearance of impropriety," the statute was triggered only if "the public might reasonably believe that he or she knew." 486 U.S. at 860. The Court reasoned that the statute looks to whether a member of the public, aware of all the relevant facts, would conclude that factors within the judge's consciousness would affect his judgment. *Id.* The Fifth Circuit's decision in this case, however, disregards that important limitation on the

scope of Section 455(a). Manifestly, no reasonably informed member of the public could believe that Judge Barbier would be influenced by his participation in the *Gilboy* case, because any person who looks at the record knows beyond peradventure that Judge Barbier *did not* actually participate in that tobacco products liability case or any other.

The Fifth Circuit's decision conflicts with *Liljeberg* in another important respect. Even after concluding that the judge's conduct violated Section 455(a), this Court instructed that "[a]s in other areas of the law, there is surely room for harmless error" and that "[t]here need not be a draconian remedy for every violation of § 455(a)." 486 U.S. at 862. Affording "due consideration" to the court of appeals' decision, this Court held that it was appropriate to vacate the district court's judgment in that case because the judge's conduct was, in several important respects, serious and "inexcusable." *Id.* at 865-67. When "[t]he violation is neither insubstantial nor excusable," a court is faced with "precisely the kind of appearance of impropriety that § 455(a) was intended to prevent," and it is appropriate to vacate the district court's judgment. *Id.* at 867. Moreover, the Court reasoned that vacatur on those facts "may prevent a substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered." *Id.* at 868.

The Fifth Circuit's application of Section 455(a) to vacate the district court's remand order in this case produces precisely the opposite result. If there were ever a "harmless" violation of Section 455(a) – entertaining the assumption that the statute had in fact been violated here – this is it. The appearance of impropriety is said to arise from Judge Barbier's deciding the merits of a tobacco products liability suit after having participated in *Gilboy*. But Judge Barbier never considered the merits of this case: the only question he ever addressed was whether to send the case back to state court or instead to stay it pending a ruling by the panel on

multidistrict litigation. Nothing about the *Gilboy* case could reasonably be said to cloud Judge Barbier's choice between those two options. Respondents' disqualification motion thus did not serve Section 455(a)'s purpose of encouraging public confidence in the judicial process but rather served only to *manipulate* that process by circumventing the statutory prohibition on appealing remand decisions. Nor, of course, could there be any prophylactic benefit to vacating the district court's decision in this case – in contrast to *Liljeberg*, judges cannot be expected to become more attentive to disqualification based on events that (like Judge Barbier's alleged participation in *Gilboy*) *never actually happened*.[4]

Because the decision below conflicts with this Court's precedents, certiorari should be granted.

II. The Decision Below Conflicts With Decisions Of Other Circuits And Well-Reasoned Opinions Of Respected Jurists.

A. Other Circuits Hold That Disqualification Is Not Required When the Public Record Dissipates the Appearance of Impropriety.

The Fifth Circuit's holding that Judge Barbier abused his discretion in not disqualifying himself rests on the view that a member of the public might *mistakenly* perceive Judge Barbier as biased. The impermissible appearance in this case is said to arise from the fact that Judge Barbier, with one of the plaintiff's lawyers in this case, supposedly endorsed a three-sentence, *pro forma* motion supporting an *amicus* brief in another tobacco suit. In reality, that never happened – Judge Barbier detailed "on the record" that his name was mistakenly placed on the motion and that he had nothing to

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[4] The Chief Justice and Justices White, O'Connor, and Scalia dissented in *Liljeberg* on the ground that Section 455(a) did not require disqualification and the vacatur of the district court's judgment on even the much more extreme facts of that case. See 486 U.S. at 870 (Rehnquist, C.J., dissenting); *id.* at 874 (O'Connor,J. , dissenting).

do with it or the accompanying brief. The Fifth Circuit nonetheless explicitly rejected the proposition that these uncontested representations by the judge "dissipate[d]" the "appearance of impropriety." Pet. App. 36a.

Other circuits squarely reject that conclusion. Those courts hold, as a matter of law, that a disqualification motion under Section 455(a) must be evaluated according to all the *actual facts* as they appear on the record. In other words, disqualification must be gauged from the perspective of the proverbial "reasonable person" – someone who takes the time to consider all the facts that the judge places on the record – rather than from the perspective of the heretofore-unknown bizarre recluse who refuses to read anything other than the signature blocks on decade-old motions to file *amicus* briefs in the Louisiana Supreme Court. Among other things, other circuits note that the statute, in Section 455(e), expressly contemplates that the judge will create a factual record on the asserted bases for disqualification. See 28 U.S.C. § 455(e) ("Where the ground for disqualification arises only under subsection (a), waiver [of the appearance of impropriety] may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification."). Decisions of the First Circuit illustrate the point particularly well.

In *In re United States*, 666 F.2d 690 (1981), the First Circuit refused to reverse a district judge's decision not to recuse himself from the trial of a state official with whom the judge, while a government attorney, had worked on a related investigation. The press had carried a variety of allegations regarding the judge's relationship with the defendant, some of which were true but a number of which were overstated or false. The court of appeals set "ground rules" to ensure that Section 455(a) would be applied only when there was an actual basis in fact, lest "the price of maintaining the purity of appearance * * * be the power of litigants or third parties to exercise a negative veto over the assignment of judges":

> First, a charge of partiality must be supported by a *factual basis*. Although public confidence may be as much shaken by publicized inferences of bias that are false as by those that are true, a judge considering whether to disqualify himself *must ignore* rumors, innuendos, and *erroneous information* published as fact in the newspapers. * * * Second, disqualification is appropriate only if the facts provide what an objective, *knowledgeable* member of the public would find to be a reasonable basis for doubting the judge's impartiality. Were less required, a judge could abdicate in difficult cases at the mere sound of controversy or a litigant could avoid adverse decisions by alleging the slightest of factual bases for bias. This restricted mandate to disqualify is calculated to induce a judge to tread the narrow path between timidity and tenacity.

666 F.2d at 694-95 (emphasis added).

The First Circuit applied that holding once again in *El Fenix de Puerto Rico* v. *The M/Y Johanny*, 36 F.3d 136 (1994), in which a party sought disqualification on the ground that the judge had invited a third party knowledgeable about the issues raised by the case to listen to the testimony, creating the impression that the judge might have intended to consult with that third party about the evidence. The district judge explained on the record that his decision "was based exclusively on the evidence presented by both parties." 36 F.3d at 140. The court of appeals held that these representations made Section 455(a) categorically inapplicable: "[Because the movant] challenges none of the findings underlying the recusal order * * * the motion for disqualification under 28 U.S.C. § 455(a) should have been denied." *Id.* The court explained that recusal is inappropriate when "the district judge was in a position to debunk the innuendo underlying" the movant's allegations:

> No permissible reading of subsection 455(a) would suggest that Congress intended to allow a litigant to

> compel disqualification simply on unfounded innuendo concerning the possible partiality of the presiding judge.
>
> * * * *
>
> The proper approach under subsection 455(e) requires the trial judge to place on the record all the facts relating to any alleged appearance of lack of impartiality and then leave entirely to the parties whether to waive disqualification under section 455(a).

Id. at 140-41.[5]

Other circuits have long adopted the same clear legal holding. As the Second Circuit concluded in *In re Drexel Burnham Lambert*, 861 F.2d 1307, 1313 (CA2 1988), "Like all legal issues, judges determine appearance of impropriety–not by considering what a straw poll of the only partly informed man-in-the-street would show–but by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all the relevant facts would recuse the judge." See also, *e.g.*, *David* v. *City & County of Denver*, 101 F.3d 1344, 1351 (CA10 1996) ("In today's era of crowded dockets, recusal has become more complicated. Although the test in this circuit is one of reasonableness, it is reasonableness tempered with a knowledge of the relevant facts."); *Voigt* v. *Savell*, 70 F.3d 1552, 1556 (CA9 1995) (holding that district judge (who was former state court judge) did not abuse his discretion in denying motion to recuse himself from suit against state court officials in light of judge's on-the-record explanation of all facts and circumstances: "A reasonable person informed of the foregoing facts would not conclude that Judge Singleton's

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[5] See also *United States* v. *Snyder*, 235 F.3d 42, 46 (CA1 2000) (reiterating and applying standard from *In re United States*, *supra*); *Blizard* v. *Frechette*, 601 F.2d 1217, 1221 (CA1 1979) ("We do not think that the impartiality of every federal judge must be demonstrated beyond a reasonable doubt in the usual sense of that phrase. A trial judge must hear cases unless some reasonable factual basis to doubt the impartiality or fairness of the tribunal is shown by some kind of probative evidence.").

impartiality might reasonably be questioned."); *United States* v. *Dandy*, 998 F.2d 1344, 1349 (CA6 1993) (holding that recusal was not required because district judge detailed that allegations he had long-time close relationship with important witness were incorrect); *Wu* v. *Thomas*, 996 F.2d 271, 275 (CA11 1993) (holding disqualification not required on the basis of district judge's close ties to defendant university because judge explained that he had no substantial financial relationship and, "[o]n these facts (which are uncontested), no reasonable observer would assume that Judge Guin had extra-judicial knowledge of this case or otherwise question Judge Guin's impartiality"); *United States* v. *Greenough*, 782 F.2d 1556, 1558 (CA11 1986) (adopting First Circuit's holding in *In re United States*, *supra*); *United States* v. *Story*, 716 F.2d 1088, 1091 (CA6 1983) (holding that, although allegations of bias were facially plausible, "[w]ith more facts available from the district court's opinion, it is clear that there are no reasonable grounds to question the judge's impartiality").

The Chief Justice also made precisely this point in his separate statement regarding recusal in *Microsoft Corp.* v. *United States*, 530 U.S. 1301, 121 S. Ct. 25 (2000). It had been reported that the Chief Justice's son represented Microsoft in other litigation. After "review[ing] the relevant legal authorities and consult[ing] with [his] colleagues," however, the Chief Justice determined that disqualification was not appropriate or required. 121 S. Ct. at 26. In particular, he detailed for the record why his son's interests would not, in fact, be affected by the Supreme Court's ruling. "Given that the inquiry under Section 455(a) 'is an objective one, made from the perspective of a reasonable observer *who is informed of all the surrounding facts and circumstances*,'" the Chief Justice explained that no appearance of impropriety could arise because "I have already explained that my son's personal and financial concerns will not be affected by our disposition of the Supreme Court's *Microsoft* matters." *Id.* (emphasis added) (citations omitted).

Relatedly, other circuits would reject the Fifth Circuit's singular focus on the Respondents' allegations of partiality, as opposed to all the relevant facts and circumstances that would be known by a fully informed member of the public. Those courts manifestly would not find that disqualification was required in this case in light of numerous circumstances that the Fifth Circuit found irrelevant. Among other things: the *Gilboy* motion was filed nearly a decade before this case arose; Judge Barbier had never participated in tobacco litigation in his entire career; Judge Barbier had never litigated any matter with the plaintiff's counsel in this case; the LTLA is a voluntary bar association not dedicated to tobacco litigation; the LTLA is not involved in this case; and Judge Barbier had no personal stake in any tobacco matters.

In *United States* v. *DeTemple*, 162 F.3d 279 (CA4 1998), a defendant alleged a variety of improprieties by the district judge, including that the judge as a private attorney had attempted to collect a debt from the defendant that was related to the criminal charges against him and that one of the judge's law clerks was married to the prosecutor. In refusing to find that the judge abused his discretion in not recusing himself, the court of appeals adopted the First Circuit's view in *In re United States*, *supra*, that the standard for requiring disqualification must be set high, lest the court "allow litigants to exercise a negative veto over the assignment of judges." 162 F.3d at 287. The court reasoned that, although the defendant's allegations "initially appear[] to raise a difficulty, examination of all of the facts and circumstances ultimately renders even this apparent conflict entirely benign." *Id.* A full examination of the record revealed that the judge's representation of the creditor had ended five years prior to the defendant's indictment and the clerk did not work on the case. Furthermore, members of the public would understand that other factors mitigated any impropriety, including that the case arose in a relatively small city in which it was more likely that a judge would previously have had "some tangential connection to a case subsequently

assigned to him." *Id.* Nor was a different result required because the defendant had raised multiple supposed grounds for recusal: "any reasonable observer familiar with the facts of this case would recognize that the number of reasons DeTemple asserts as a basis for recusal reflects his ingenuity in finding conflicts around every corner rather than the merit of his claim." *Id.* at 288. See also *Datagate* v. *Hewlett-Packard Co.*, 941 F.2d 864, 871 (CA9 1991) (adopting the approach of *Hewlett-Packard Co.* v. *Bausch & Lomb, Inc.*, 882 F.2d 1556 (CAFC 1989), which held that, notwithstanding concerns raised by allegations of impropriety, "other facts mollify the situation").

B. Other Circuits Hold That a Pre-Judicial Association with a "Position" Is Not a Ground for Disqualification.

To hold that disqualification was required in this case, the Fifth Circuit adopted the principle of "issue recusal." The court of appeals concluded that an "appearance of impropriety" arose because the presence of Judge Barbier's name on the *Gilboy* motion associated him with the pro-plaintiff position taken by the LTLA in that tobacco products liability case. See Pet. App. 35a-36a. Moreover, the panel embraced an extraordinarily attenuated assertion of "issue recusal," requiring Judge Barbier's disqualification merely because the allegations in *Gilboy*, although they "may be distinguishable," contained "general statements" that were "similar" to those raised in this case. *Id.* As the dissenters from the denial of rehearing *en banc* explained, "Never before has any court accepted 'issue recusal' as a ground for reversing a judge who in his own exercise of discretion, concluded that his recusal was not required." Pet. App. 16a.

The plaintiffs in *Cipollone* v. *Liggett Group*, 802 F.2d 658, 659 (CA3 1986), sought the recusal of a member of the appellate panel on the ground that "while in private practice, [he] represented the American Tobacco Company in a case involving a similar products liability claim." The court of appeals refused: "If Judges could be disqualified because

their background in the practice of law gave them knowledge of the legal issues which might be presented in cases coming before them, then only the least informed and worst-prepared lawyers could be appointed to the bench." 802 F.2d at 659-60. (It is noteworthy that Liggett and American Tobacco Company conveniently reverse course and take practically the opposite position here.)[6]

The First Circuit recently took the same view in *United States* v. *Snyder*:

> A judge's views on matters of law and policy ordinarily are not legitimate grounds for recusal, even if such views are strongly held. See RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 10.2 (1996) (collecting cases). After all, judges commonly come to a case with personal views on the underlying subject matter; indeed, many judges are known to dislike aspects of the Sentencing Guidelines.

[6] The court of appeals also held that disqualification would not be appropriate even if American Tobacco Company were a party in the *Cipollone* action because "the long passage of time since Judge Hunter's last representation of that Company requires the conclusion that no reasonable person could question his impartiality." 802 F.2d at 659 (collecting cases). The same principle applies here given the nearly ten-year gap between the filing of the *Gilboy* brief and Judge Barbier's consideration of this case.

Relatedly, the Third Circuit would attach special significance to the fact that, even if the *Gilboy* motion demonstrated Judge Barbier's association with tobacco litigation, the Judge's tenure as President of the LTLA had ended by the time the motion was filed. See *United States* v. *Di Pasquale*, 864 F.2d 271 (1988) (disqualification not required notwithstanding that district judge was supervisory U.S. Attorney during prior investigation of same defendant on related conspiracy; court relies on judge's representation that period of service had ended by the time present investigation was undertaken); *Edelstein* v. *Wilentz*, 812 F.2d 128 (1987) (disqualification not required, notwithstanding that district judge previously served as director of agency that promulgated ethics rule which barred plaintiff's claim, because period of service had ended eight years earlier and prior to time rule was issued; court requires that reasonable person "would" perceive impropriety).

> Far from necessarily warranting recusal, typically such views merely mark an active mind. See *Laird* v. *Tatum*, 409 U.S. 824, 835 (1972) ("Proof that a [judge's] mind * * * was a complete tabula rasa * * * would be evidence of lack of qualification, not lack of bias."); John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 250-51 (1987) (discussing Judge Jerome Frank's statement that "if * * * bias and partiality be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will").

235 F.3d 42, 48 (2000). See also, *e.g.*, *Mitchael* v. *Intracorp*, 179 F.3d 847, 861 (CA10 1999) (disqualification not required when district judge had previously represented same defendant insurers in insurance defense matters: "Reduced to its essence, that is what plaintiffs argue should cause Judge Belot to recuse [himself] from this case–familiarity with insurance defense work."); *Rosquist* v. *Soo Line R.R.*, 692 F.2d 1107, 1112 (CA7 1982) ("[Plaintiffs' counsel] contends that the District Judge was biased on the issue of contingent attorney's fees and that prejudice prevented a fair determination of the fee. Judge Grady had, in the past, written and spoken on the subject of contingent fees. He was not required, however, to recuse himself merely because he holds and had expressed certain views on that general subject.").

Leading opinions from respected jurists have similarly rejected attempts to invoke "issue recusal." The best known of these is the Chief Justice's statement regarding recusal in *Laird* v. *Tatum*, 409 U.S. 824 (1972), in which he explained that his disqualification was not required by his previous testimony, while an official of the Department of Justice, on the subject matter of the *Laird* case and, in passing, *Laird* itself. Cautioning that the disqualification statute should not be read to "make a great deal of very little" (409 U.S. at 826), the Chief Justice found that the concept of "public-statement disqualification" has "little to commend [it] on the merits"

(*id.* at 833). "Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." *Id.* at 835.[7]

Although *Laird* arose before the enactment of Section 455(a), the Chief Justice's rejection of "issue recusal" has subsequently been widely embraced, including notably by Judge Posner in *Schurz Communications* v. *FCC*, 982 F.2d 1057 (CA7 1992) (opinion respecting recusal). In that case, Judge Posner was asked to disqualify himself under Section 455(a) because, while in private practice, he had submitted an expert affidavit in a case that, like *Schurz*, involved "whether and how much the television networks should be restricted from participating in the production and distribution of television programs." 982 F.2d at 1059-60. Citing *Laird* and *Cipollone*, *supra*, Judge Posner concluded that recusal was inappropriate. He explained that "the standard under section 455(a)" is whether "anyone who troubles to equip himself with all the facts bearing on the circumstances of my participation in this and the 1977 proceeding" would find the facts an impediment to his ability to "judg[e] the present case impartially." *Id.* at 1061. Judge Posner explained that, if disqualification were required in those circumstances, "I would be eternally disqualified from participating in antitrust or regulatory cases, because when I was a law professor I acted frequently as a consultant and occasionally as an expert witness in regulatory and antitrust matters that presented the same types of issue, often in the same industry, as do the cases that come before this court. No decision supports such an interpretation." *Id.* at 1061. Accord *Del Vecchio* v. *Illinois Dep't of Corrs.*, 31 F.3d 1363, 1389 (CA7 1994) (en banc) (Easterbrook, J., concurring) ("'Appearance' problems

[7] The Chief Justice found compelling the numerous instances in which members of this Courth ad notrec used themselves notwithstanding that they had spoken on, or been involved with, related matters prior to taking the bench. 409 U.S.at 831-34 (collecting examples).

lurk everywhere, for they are in the eye of the beholder. * * * A disqualification rule based on connections to lawyers and litigants would relieve a majority of this court of all cases involving the national government, because six of us formerly worked in the Department of Justice.").[8]

C. Other Circuits Impose a Higher Burden to Require Disqualification.

The legal standard applied by the Fifth Circuit in holding that Judge Barbier abused his discretion in refusing to disqualify himself conflicts with decisions of other circuits in two respects. The Fifth Circuit held not only that Section 455(a) mandates recusal whenever a reasonable person "might" doubt the judge's impartiality, but also that the failure of a judge to disqualify himself in that circumstance is *per se* an "abuse of discretion." According to the court of appeals, "[W]e hold that a reasonable person *might* harbor doubts about the trial judge's impartiality, and *thus* the district court *abused its discretion* in denying the defendants' motion to recuse." Pet. App. 37a (emphasis added). The circuits' conflicting standards are outcome determinative here because the Fifth Circuit determined that, even under its exceedingly lenient test, "this is a close case for recusal." *Id.* 36a.

Unlike the Fifth Circuit, the Eighth and Tenth Circuits hold that disqualification is appropriate under Section 455(a) only when a reasonable person actually "would" doubt the judge's impartiality. See *Sac & Fox Nation* v. *Cuomo*, 193 F.3d 1162, 1168 (CA10 1999) ("The court must decide 'whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality.'" (quoting *United States* v. *Cooley*, 1 F.3d 985, 993 (CA10

[8] Justice Breyer similarly embraced the Chief Justice's views in *Laird* when, as a circuit judge also serving on the Sentencing Commission, he concluded that he generally would not recuse himself from sentencing cases. See *United States* v. *Wright*, 873 F.2d 437, 477 (CA1 1989).

1993))); *O'Bannon* v. *Union Pac. R.R. Co.*, 169 F.3d 1088, 1091 (CA8 1991) ("Would the average person, knowing the facts alleged by the parties seeking disqualification, question the Judge's impartiality, and, if so, would the question be reasonable?").

Judge Tjoflat has succinctly stated the sound reasons underlying such a heightened standard: "If Congress had wanted judges to abandon all caution in deciding motions to recuse, they would have enacted a scheme of disqualification on demand." *Carter* v. *West Publ'g Co.*, No. 99-11959-EE, 1999 U.S. App. LEXIS 38480, at *7 (CA11 Nov. 1, 1999). Judge Weinstein has similarly noted, "If misapplied * * * this statute can be used as a powerful tool by parties who wish to judge-shop." *Disqualification of Judges (The Sarokin Matter): Is It a Threat to Judicial Independence?*, 58 BROOK. L. REV. 1063, 1071 (1993) (panel discussion). See also H.R. Rep. No. 93-1453 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355 ("[I]n assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a *reasonable* basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a 'reasonable' fear that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice."); RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION § 24.2.3 (1996) ("[W]hile courts generally agree that § 455(a) broadens the grounds for judicial disqualification, that section is not to be so broadly construed that it becomes in effect presumptive. * * * The statute is not intended to give litigants a veto power over sitting judges or a vehicle for obtaining a judge of their choice * * *.").

Three circuits would furthermore reject the Fifth Circuit's holding that every erroneous denial of a Section

455(a) disqualification motion automatically constitutes an "abuse of discretion." See Pet. App. 37a. The First, Ninth, and Eleventh Circuits have given the "abuse of discretion" standard real teeth. In those courts, a district judge's failure to recuse himself under Section 455(a), even if erroneous, will not be reversed unless, at the very least, it constituted a "clear error of judgment." "[C]onsidering that the standard of review is abuse of discretion, we will affirm a district judge's refusal to recuse himself unless we conclude that the impropriety is clear and one which would be recognized by all objective, reasonable persons." *United States* v. *F. Lee Bailey*, 175 F.3d 966, 968 (CA11 1999). See also *Datagate* v. *Hewlett-Packard Co.*, 941 F.2d 864 (CA9 1991) ("clear error of judgment"); *United States* v. *Kelly*, 888 F.2d 732 (CA11 1989) (same); *In re United States*, 666 F.2d at 695 ("The appellate court, therefore, must ask itself not whether it would have decided as did the trial court, but whether that decision *cannot be defended as a rational conclusion* supported by reasonable reading of the record." (emphasis added)).

Because the decision below conflicts with decisions of other circuits and well-reasoned opinions of respected jurists, certiorari should be granted.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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December 4, 2001

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED SEPTEMBER 5, 2001

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-30687

REPUBLIC OF PANAMA,

Plaintiff,

v.

THE AMERICAN TOBACCO COMPANY, INC., ET AL.,

Defendants,

FORTUNE BRANDS, INC., formerly known as American Brands Inc.; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION, Individually and as successor by merger to The American Tobacco Company; BATUS, INC.; BATUS HOLDINGS, INC.; PHILIP MORRIS INCORPORATED; PHILIP MORRIS COMPANIES, INC.; LORILLARD TOBACCO CO.; LIGGETT GROUP INC.; THE TOBACCO INSTITUTE, INC.; QUAGLINO TOBACCO AND CANDY COMPANY, INC.; J&R VENDING SERVICES, INC.,

Defendants.

Appendix A

SAO PAULO STATE, of the Federative Republic of Brazil,

Plaintiff-Appellee,

v.

THE AMERICAN TOBACCO COMPANY, INC., ET AL.,

Defendants,

FORTUNE BRANDS, INC., formerly known as American Brands Inc.; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION, Individually and as successor by merger to The American Tobacco Company; BATUS, INC.; BATUS HOLDINGS, INC.; PHILIP MORRIS INCORPORATED; PHILIP MORRIS COMPANIES, INC.; LORILLARD TOBACCO CO.; LIGGETT GROUP INC.; THE TOBACCO INSTITUTE, INC.; QUAGLINO TOBACCO AND CANDY COMPANY, INC.; J&R VENDING SERVICES, INC.,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON PETITION FOR REHEARING EN BANC
(Opinion May 14, 2001, 5th Cir., 2001, 250 F.3d 315)

Appendix A

Before EMILIO M. GARZA, STEWART and PARKER, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The Court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor[1] (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

1. Judge Barksdale and Judge Benavides did not participate in the consideration of the petition for rehearing en banc.

Appendix A

JACQUES L. WIENER and ROBERT M. PARKER, Circuit Judges, joined by CAROLYN DINEEN KING, PATRICK E. HIGGINBOTHAM, W. EUGENE DAVIS and JAMES L. DENNIS, Circuit Judges, dissenting from the Court's denial of the Petition for Rehearing En Banc:

The panel opinion for this case marks the first time in the history of American jurisprudence that an appellate court has reversed a trial judge's discretionary refusal to recuse himself — and has ordered the judge recused — based solely on the fact that many years earlier, while he was a practicing attorney, he had been linked (erroneously at that) with one view of a legal issue that was then pending in state court and only recently resurfaced in a case pending before him in federal court.[2] The Petition for Rehearing En Banc challenges the panel's holding that a federal district judge ("the Judge") abused his discretion by refusing to recuse himself pursuant to 28 U.S.C. § 455(a), simply because he had been mistakenly identified, years before he became a judge, as having an "association with the legal position" now being espoused by one of the parties in a case pending before him.

The Petition for Panel Rehearing challenged the panel's holding that under those circumstances the Judge abused his discretion by not recusing himself pursuant to 28 U.S.C. § 455(a). We respectfully but vigorously dissent from the refusal of a majority of the active judges of this court to rehear this matter en banc. We would have granted rehearing en banc, not merely because we view the panel opinion[3] as

2. *Republic of Panama I*, 217 F.3d at 347.

3. The panel opinion in this matter, *Republic of Panama v.* (Cont'd)

wrongly decided, but primarily because the nature of the error committed in pronouncing that result dangerously erodes the discretion that Congress has assigned to federal judges in matters of recusal while opening a new, broad avenue for litigants to avoid appearing before a judge they perceive to be unfairly disinclined to favor their side of a case.

FACTS AND PROCEDURAL HISTORY

In October 1998, the Republic of Panama filed suit alleging that the defendant tobacco companies conspired to conceal the addictiveness and health risks of tobacco and seeking compensation for health costs for diseases caused by smoking. *Republic of Panama I*, 217 F.3d at 344. The defendant tobacco companies removed the case to federal court. *Id.* at 345. In 1999, the tobacco companies sought to recuse the Judge, who had been assigned to the case. *Id.* The Judge exercised the discretion vested in him by statute, explaining in detail why he was denying the motion to recuse himself and remanding the action to state court. *Id.* On appeal, a panel of this court held that the Judge had abused his discretion, reversed his order denying recusal, vacated his order remanding the case to state court, and remanded the

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(Cont'd)
American Tobacco Co., Inc., 250 F.3d 315 (5th Cir. 2001) ("*Republic of Panama II*"), followed, as it had to, the earlier panel decision in a companion case, *Republic of Panama v. American Tobacco Co., Inc.*, 217 F.3d 343 (5th Cir. 2000) ("*Republic of Panama I*"). Both of these cases involve identical facts and decisions regarding the recusal issue at both the trial and appellate level. We acknowledge that the panel in *Republic of Panama II* was constrained by precedent and was not free to correct what we view as the error of *Republic of Panama I*.

action to the district court for reassignment to a different judge. *Republic of Panama II*, 250 F.3d at 316.

The motion to recuse was based solely on the fact that the Judge had been listed — erroneously — as the president of a specialized bar association (the Louisiana Trial Lawyer's Association ("LTLA")) on that organization's motion seeking permission to file an amicus curiae brief in similar state court tobacco litigation some nine years earlier. The Judge's name did not appear on the amicus brief itself.

Almost a decade prior to his appointment to the federal trial bench, the Judge had served a one-year term as president of the LTLA, from approximately October 1989 — October 1990. In April 1991, some six months after his term as president had expired, LTLA filed the subject motion seeking permission to file an amicus brief in the appeal of a tobacco products liability case in the Supreme Court of Louisiana. Despite his being president no longer, the Judge's name was mistakenly listed as President of the LTLA on the "Motion for Leave to File Amicus Curiae Brief" which was filed simultaneously with the filing of the association's amicus brief. The Judge signed neither the motion nor the brief, either as counsel or as an officer of the putative amicus association. Listed among the counsel on this motion, however, was Michael St. Martin, who is also counsel for the plaintiff in the present action. The amicus brief itself was not signed by Mr. St. Martin (or by the Judge) but by another attorney; neither did the brief or the motion list the Judge as counsel.

Although they were not identical to the allegations in the present case, the LTLA's 1991 amicus brief did contain

allegations similar to those in the current litigation, including, *inter alia*, that smoking is addictive and that it causes cancer, and that the defendant tobacco companies knew or should have known about the health dangers of smoking. The amicus brief argued that the tobacco companies should be held liable because they were negligent in producing their product.

In denying the tobacco defendants' recusal motion in the present case, the Judge specifically informed the parties that, even though his name had been listed on the motion seeking permission to file the amicus brief in state court years ago, it had been placed on the motion by mistake; his term as president of LTLA had ended months before by the time the brief was filed. The Judge further informed the parties that he had nothing to do with the research, writing, signing, or approval of the brief; and that neither as a practicing attorney nor in any other capacity had he ever participated in any tobacco litigation. And the Judge also explained that the decision to file an amicus brief and the determination of the contents of the brief were exclusively governed by the LTLA Amicus Committee, not the president or executive committee of the association.

DISCUSSION

We review the denial of a motion to recuse for abuse of discretion. *Trevino v. Johnson*, 168 F.3d 173, 178 (5th Cir. 1999). A judge should recuse himself "in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). "In order to determine whether a court's impartiality is reasonably in question, the objective inquiry is whether a well-informed, thoughtful and objective observer

would question the court's impartiality." *Trust Co. v. N.N.P.*, 104 F.3d 1478, 1491 (5th Cir. 1997). The purpose of § 455(a) is to avoid even an appearance of partiality. *United States v. Jordan*, 49 F.3d 152, 155 (5th Cir. 1995).

We are firmly convinced that no reasonable person, aware of all the facts, would question any judge's impartiality based on circumstances as attenuated as those presented by this case: (1) The Judge's name was listed, erroneously and without his knowledge, on a motion to file an amicus curiae brief — not even the brief itself; (2) the motion and brief were filed on behalf of an association of which the future judge was a past president; (3) the motion was filed in a state court proceeding seven years before the Judge took the bench and eight years before the present lawsuit was filed; (4) the motion related to a legal issue in which the Judge had never been involved as a practicing attorney or otherwise; and (5) it was filed by lawyers for the association with whom the Judge has never been a partner or an associate.

On appeal, the tobacco companies urged a panel of this court to adopt the rule that any judge who had a "pre-judicial association with the position" — not with the parties, not with the lawyers, but with a "position" — can never fairly decide a case that raises questions pertaining to that "position." In buying into that proposition, the panel clearly called into question the oath we take when we become federal judges. If we should embark on such a perilous course, we will launch a cottage industry in which investigators will comb the contents of speeches made, articles written, and pleadings and briefs filed by a judge prior to his taking of that oath, looking for some trace of evidence suggesting that,

prior to his judgeship, the judge held views on legal questions that can be used to disqualify him from hearing cases that implicate such matters. Nothing — not the statute, not our jurisprudence, not the public policy underlying the concept of recusal — supports the panel's decision to require the Judge's recusal under such attenuated circumstances.

Republic of Panama I correctly notes that this record includes no evidence of actual bias on the part of the Judge. *Republic of Panama I*, 217 F.3d at 347. It nevertheless concludes that nothing more than the mere listing of the Judge's name on a motion to file an amicus brief that years earlier had asserted allegations against tobacco companies similar to those asserted by the plaintiffs in this case, could lead a reasonable person to doubt the Judge's impartiality. *Id.*

The panel's analysis of *Republic of Panama I* relies on but a single case, *Bradshaw v. McCotter*, 785 F.2d 1327 (5th Cir. 1986). In *Bradshaw*, a criminal defendant argued that a judge on the Texas Court of Criminal Appeals should have been disqualified because at the time of the defendant's conviction the future Judge's name was listed on a brief as State Prosecuting Attorney in the defendant's appeal. *Id.* at 1328. The judge in *Bradshaw* explained that in fact he had not participated in the prosecution of the case at all, and that his name had appeared on the brief simply as a matter of courtesy and protocol. We held that whether the judge actually participated in the prosecution was immaterial because the listing of his name on the brief undermined the appearance of impartiality. *Id.* at 1329.

Yet, when carefully read, the opinion in *Bradshaw* makes pellucid that it does not present a "somewhat similar fact situation" to that in *Republic of Panama I*. *Republic of Panama I*, 217 F.3d at 347. The recusal ordered in *Bradshaw* was directed at a judge who was not just *correctly* listed on the State's brief as prosecuting attorney (albeit he did not personally participate in the prosecution), but who was in fact scheduled to hear the appeal of the *very same* case of the *very same* criminal defendant. *Bradshaw* does not deal with a mere *amicus*; it is not a civil case; it does not involve a union, trade association, or bar association; it correctly identified the judge as the prosecuting attorney; and it implicated a substantive pleading — the appellate brief — not, as here, a non-substantive, procedural motion. Because *Bradshaw* neither presents nor answers the questions raised by the instant case, it affords no support for the panel's decision to require the Judge's recusal under the present circumstances.

Although *Bradshaw* offers no map out of the present situation, we are not here navigating uncharted waters. In an earlier en banc decision, this court held that a district judge who, before ever becoming a judge, served as president of a racially segregated bar association, was not thereby disqualified from hearing plaintiffs' claims of racial discrimination in the administration of the Alabama State Bar examination. *Parrish v. Bd. of Comm'rs of the Ala. State Bar*, 524 F.2d 98 (5th Cir. 1975). Even though that future judge had actually taken steps to change the bar's segregation policy, he was faulted by those who sought his recusal for the failure of his effort to obtain membership for African-American lawyers during his term of leadership. *Id.* at 101.

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We held in *Parrish* that the allegation concerning the judge's "past activities in the Montgomery [Alabama] Bar Association [] is essentially an allegation based on the judge's background and states no specific facts that would suggest he would be anything but impartial in the deciding the case before him." *Id.*

The facts in *Parrish* more closely parallel those presented in this case than do the facts in the *Bradshaw* decision relied on by the *Republic of Panama I* panel. Even if the views expressed in the amicus brief ten years earlier had been firmly held by the Judge at the time that the brief was written (note that nothing other than his membership in the amicus association and his prior presidency of it can be cited as evidence that in fact he held those views), this would not be grounds for forced recusal under the jurisprudence of this or any other circuit. More to the point, that is not the question presented by the record in this case, which does not indicate that the Judge *ever* expressed any anti-tobacco sentiments, either publicly or privately, much less that he ever participated in any tobacco litigation whatsoever, whether as a party or as counsel. His only "taint" was his connection to a bar association that advocated, solely as a friend of the court, a similar position on similar litigation in state court almost a decade earlier. Such an attenuated nexus is woefully insufficient to underpin this court's interference with the Judge's decision, which was well within his discretion.

Equally important in sorting out this issue is the position taken by the United States Supreme Court. In *Laird v. Tatum*, 409 U.S. 824 (1972) (Rehnquist, J., mem.) then-Associate Justice Rehnquist decided not to disqualify himself on the

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basis of public statements he had made prior to his appointment to the bench. As a Department of Justice lawyer, he had testified as an expert witness before the Senate Judiciary Committee's Subcommittee on Constitutional Rights regarding the statutory and constitutional law dealing with the authority of the executive branch to gather information. Notably, then-attorney Rehnquist's remarks included a reference to the very case involved (*Laird*), which then was pending in the D.C. Circuit. *Id.* at 825-27. The respondents contended that the Justice should disqualify himself because he had previously expressed a public view concerning what the law is or ought to be in the matters presented in the *Laird* litigation. *Id.* at 824-25. In declining to recuse, Justice Rehnquist stated:

> Proof that a Justice's mind at the time he joined the court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias. . . .
>
> The oath prescribed by 28 U.S.C. § 453 which is taken by each person upon becoming a member of the federal judiciary requires that he "administer justice without respect to persons, and do equal right to the poor and to the rich," that he "faithfully and impartially discharge and perform all the duties incumbent upon (him) . . . agreeably to the Constitution and laws of the United States." Every litigant is entitled to have his case heard by a judge mindful of this oath. But neither the oath, the disqualification statute, nor the practice of the former Justices of this Court guarantee a litigant

> that each judge will start off from dead center in his willingness or ability to reconcile the opposing arguments of counsel with his understanding of the Constitution and the law. That being the case, it is not a ground for disqualification that a judge has prior to his nomination expressed his then understanding of the meaning of some particular provision of the Constitution.

Id., 409 U.S. at 835; 838-39.

In addition to repudiating clear direction from both our own en banc court and the Supreme Court, the panel opinion disregards the unanimous voices of other U.S. Courts of Appeals that have addressed the issue. For example, in *Schurz Communications v. FCC*, 982 F.2d 1057 (7th Cir. 1992), Judge Richard Posner denied a recusal motion that was based on an affidavit he had submitted as an expert witness fifteen years earlier in an antitrust case involving the identical question presented in the case in which his disqualification was being sought. Judge Posner reasoned that if 28 U.S.C. § 455(a) were interpreted to require recusal in such a situation,

> I would be eternally disqualified from participating in antitrust or regulatory cases, because when I was a law professor I acted frequently as a consultant and occasionally an as expert witness in regulatory and antitrust matters that presented the same types of issues, often in the same industry, as do cases that come before this court. No decision supports such an interpretation.

* * *

> The affidavit repeated views about antitrust policy that I had stated in many different fora over a period of years, and the movants do not and could not argue that a judge should disqualify himself because he has views on a case.

Id. at 1061-62.

Similarly, in a much more closely analogous case, *Cipollone v. Liggett*, 802 F.2d 658 (3rd Cir. 1986), the district judge had, while in private practice, represented a tobacco company in a case involving a products liability claim like the one currently pending before him as a judge. The Third Circuit affirmed the district court's decision not to recuse himself, stating:

> [P]rior knowledge about legal issues is not a ground for recusal of a Judge. . .. If Judges could be disqualified because their knowledge of legal issues which might be presented in cases coming before them, then only the least-informed and worst-prepared lawyers could be appointed to the bench.

Id. at 659-60. *See also United States v. Payne*, 944 F.2d 1458 (9th Cir. 1991) (rejecting the notion that generalized policy views, expertise on and exposure to a subject necessitates recusal); *United States v. Alabama*, 828 F.2d 1532 (11th Cir. 1987) (holding that district judge's background representing plaintiffs in civil rights actions does not warrant disqualification in a school desegregation case brought by United States against Alabama); *Rosquist v. Soo Line*

Railroad, 692 F.2d 1107 (7th Cir. 1982) (affirming a denial of recusal and holding that a judge is not required to recuse himself merely because he holds and had expressed certain views on a subject.)

In the instant litigation, the defendant tobacco companies imply that the fact that, in the old state case, the name of one of today's opposing counsel was listed as counsel for the amicus association on the same pleading (motion for permission to file an amicus brief) as was the name of the Judge (erroneously) as president of the client association — thereby evidencing that they belonged to the same bar association — requires recusal. This argument is so lacking in merit that it needs no further comment. Another concern raised by the tobacco defendants is that the Judge "appeared" to have been involved in litigation against the same tobacco companies. This too is feckless, as we have long rejected this "identity of parties" argument. For example, in *Chitimacha Tribe of Louisiana v. Harry L. Laws Co., Inc.*, 690 F.2d 1157 (5th Cir. 1982), the presiding judge had, during his law practice prior to assuming the bench some six years earlier, represented Texaco, currently a defendant in the case before him, on an unrelated matter. *Id.* at 1166. Other defendants in the case were related to partners in the judge's former law firm. *Id.* at 1167. We agreed with the Judge that his recusal was not required, declaring his connection with Texaco too remote and innocuous to warrant disqualification. If direct representation of a party (not an amicus) six years earlier is too remote, surely mere membership in and past presidency of a bar association whose only nexus with the appeal then pending before the state supreme court was the filing of an amicus brief eight years earlier, relating to a

common — but non-represented — party, cannot require reversal of the Judge's exercise of discretion not to recuse himself.

We can perceive no legitimate basis for disturbing the Judge's exercise of discretion in this case and would affirm his denial of the recusal motion. We are satisfied that this issue cuts across ideology, politics, and judicial philosophy, and that it has the potential for undermining the independence of the federal judiciary. No existing jurisprudence supports, much less requires, recusal of a judge who, years before taking the judicial oath, had expressed an opinion on an issue of law, or had represented the same or a related party, or had belonged to and held office in an organization that advocated a particular view of public policy or legal interpretation. Never before has any court accepted "issue recusal" as a ground for reversing a judge who in his own exercise of discretion, concluded that his recusal was not required. The panel decision that this court has refused to rehear en banc sets an alarming precedent by doing precisely that, and trivializes our oath in the process. For these reasons we are constrained to dissent from the refusal of a majority of the judges of this court to vote to rehear this case en banc.

APPENDIX B — PER CURIAM OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED MAY 14, 2001

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 00-30687
Summary Calendar

REPUBLIC OF PANAMA,

Plaintiff-Appellee,

v.

THE AMERICAN TOBACCO COMPANY, INC., ET AL.,

Defendants,

FORTUNE BRANDS, INC., formerly known as American Brands Inc.; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION, Individually and as successor by merger to The American Tobacco Company; BATUS, INC.; BATUS HOLDINGS, INC.; PHILIP MORRIS INCORPORATED; PHILIP MORRIS COMPANIES, INC.; LORILLARD TOBACCO CO.; LIGGETT GROUP INC.; THE TOBACCO INSTITUTE, INC.; QUAGLINO TOBACCO AND CANDY COMPANY, INC.; J&R VENDING SERVICES, INC.,

Defendants-Appellees.

Appendix B

SAO PAULO STATE, of the Federative Republic of Brazil,

Plaintiff-Appellee,

v.

THE AMERICAN TOBACCO COMPANY, INC., ET AL.,

Defendants,

FORTUNE BRANDS, INC., formerly known as American Brands Inc.; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION, Individually and as successor by merger to The American Tobacco Company; BATUS, INC.; BATUS HOLDINGS, INC.; PHILIP MORRIS INCORPORATED; PHILIP MORRIS COMPANIES, INC.; LORILLARD TOBACCO CO.; LIGGETT GROUP INC.; THE TOBACCO INSTITUTE, INC.; QUAGLINO TOBACCO AND CANDY COMPANY, INC.; J&R VENDING SERVICES, INC.,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before EMILIO M. GARZA, STEWART and PARKER, Circuit Judges.

Appendix B

PER CURIAM:

In light of our prior decision in *Republic of Panama v. The American Tobacco Co.*, 217 F.3d 343 (5th Cir. 2000), the district court's order denying recusal is REVERSED. The district court's orders remanding this action to state court and denying Appellants' renewed request and motion for stay are VACATED. We REMAND this action to the district court for reassignment by the Chief Judge of the district court to a different judge for further proceedings.

Reversed in part and vacated in part; remanded for further proceedings consistent with this opinion.

Appendix B

ROBERT M. PARKER, Circuit Judge, concurring specially:

While I agree with my colleagues that we are bound by precedent, I write separately because I believe that *Republic of Panama* was wrongly decided. In that decision, a panel of this court held that the district judge abused his discretion by not recusing himself because the judge's name was listed along with Appellee's counsel on a motion for leave to file an amicus brief in an unrelated action asserting allegations similar to Appellee's.

Such facts do not establish that a reasonable person aware of all the facts would reasonably question the judge's impartiality under 28 U.S.C. § 455(a). *See Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1165 (5th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983). The district judge's name was erroneously listed on the motion for leave to file an amicus brief on behalf of the Louisiana Trial Lawyers' Association ("LTLA"), a voluntary bar organization that routinely expresses legal viewpoints to courts through amicus briefs. The district judge did not participate directly in the researching, writing, or approval of the brief itself, and his name does not appear on the brief. Moreover, the motion and brief were filed more than ten years ago in an unrelated action in Louisiana Supreme Court before the judge's appointment to the federal judiciary. These facts are simply too tenuous to support any reasonable basis for questioning the judge's impartiality, and even if these facts clearly raise the issue of impartiality, it is error to conclude that the judge abused his sound discretion in denying the motion for recusal.

Republic of Panama incorrectly relied on *Bradshaw v. McCotter*, 785 F.2d 1327 (5th Cir.), *rev'd*, 796 F.2d 100 (5th Cir. 1986), as presenting a "somewhat similar" factual situation. In *Bradshaw*, we held that a judge of the Texas Court of Criminal Appeals should have disqualified himself because at the time of the defendant's conviction the judge's name was listed as a prosecuting attorney on a brief opposing the defendant's appeal, even though the listing was simply a matter of courtesy and protocol. Notwithstanding the irrelevance of whether the judge actually participated in the preparation of the brief, *Bradshaw* is distinguishable from *Republic of Panama* and this action because in *Bradshaw* the judge, before taking the bench, was listed as the prosecuting attorney *in the same case* on appeal before him. In *Republic of Panama* and this action, the district judge was merely listed as the president of the LTLA on a motion for leave to file an amicus brief in an unrelated action before a different court more than ten years ago.

While *Republic of Panama* notes that there are no decisions precisely on point, relevant decisions confirm that the district judge's denial of Appellants' motion for recusal was not improper. In *Laird v. Tatum*, 409 U.S. 824 (1972) (Rehnquist, J., mem.), then-Associate Justice Rehnquist decided not to disqualify himself on the basis of his public statements on the constitutionality of governmental surveillance, which was contrary to the arguments of the parties seeking his disqualification. As a Department of Justice lawyer, Justice Rehnquist had testified as an expert witness before the Senate and publicly stated his views on the constitutionality of governmental surveillance of civilian political activity. He testified that the arguments of the parties

seeking disqualification, whose appeal was before the court of appeals during the testimony, lacked merit. Framing the issue as whether disqualification is proper if a judge, "who[,] prior to taking that office[,] has expressed a public view as to what the law is or ought to be should later sit as a judge in a case raising that particular question," *id.* at 830, Justice Rehnquist analyzed the practices of prior justices, who did not disqualify themselves in cases in which they, prior to taking the bench, previously expressed a viewpoint of the controlling law, and concluded that such public statements could not rationally be the basis for disqualification. *Id.* at 835-36; *see also United States v. Alabama*, 828 F.2d 1532, 1542 (11th Cir. 1987) (rejecting, in an action challenging segregation in education, disqualification of a district judge on the basis of his background as a civil rights lawyer representing black plaintiffs and stating "[a] judge is not required to recuse himself merely because he holds and has expressed certain views on a general subject."), *cert. denied*, 487 U.S. 1210 (1988); *Shaw v. Martin*, 733 F.2d 304, 316 (4th Cir.) ("One who has voted as a legislator in favor of a statute permitting the death penalty in a proper case cannot thereafter be presumed disqualified to hear capital cases as a judge or predisposed to give a death sentence in any particular case."), *cert. denied*, 469 U.S. 873 (1984). While *Laird* was decided prior to the amendment of § 455[1] to include

1. Before the 1974 amendment, § 455 stated:

> Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with

(Cont'd)

subsection (a),[2] Justice Rehnquist's analysis is important because the motion seeking disqualification based on his prior public statements was not pursuant to any specific provision of § 455 at the time, but on the discretionary portion of the statute, *see Tatum*, 409 U.S. at 830, which was similar to the "catchall" provision of § 455(a).

Similarly, in *Schurz Communications, Inc. v. FCC*, 982 F.2d 1057 (7th Cir. 1993) (Posner, J.), Judge Posner denied a motion for disqualification based on an affidavit he submitted as an expert witness on antitrust law prior to becoming a circuit judge. In rejecting the motion, Judge Posner stated "[t]he affidavit repeated views about antitrust policy that I had stated in many different fora over a period of years, and the movants do not and could not argue that a judge should disqualify himself because he has views on a case." *Id.* at 1062 (citing 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3542 at 568-70 (1st ed. 1975)).

Finally, *Cipollone v. Liggett Group, Inc.*, 802 F.2d 658 (3d Cir. 1986), is also important. In *Cipollone*, the husband

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(Cont'd)

> any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

28 U.S.C. § 455 (1970), *amended by* 28 U.S.C. § 455(a)-(f) (2000).

2. The 1974 amendment created § 455(a), which states that "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

of a deceased cigarette smoker brought a products liability action against cigarette manufacturers alleging that his wife's injury and death were cigarette-induced. A panel of the Third Circuit held that some of the plaintiff's claims were federally preempted. The plaintiff then moved to vacate the judgment because a member of the panel should have recused himself due to an appearance of partiality. The plaintiff alleged that such appearance of partiality arose because the judge, while in private practice, represented The American Tobacco Company, which was not a defendant in the plaintiff's action, in a similar products liability action The court denied the motion because The American Tobacco Company was not a defendant, the issue of preemption was not raised in the prior litigation involving the judge, and even if The American Tobacco Company were a defendant no reasonable person could question the judge's impartiality because his representation ended more than five years before he took the bench. *Id.* at 658-59.

In light of these decisions, I am convinced that *Republic of Panama* is erroneous because it requires recusal on the basis of a judge's public statements on the law made prior to becoming a judge, which I believe is unreasonable under § 455(a). In denouncing such "public statement disqualification," Justice Rehnquist aptly observed that

> [i]t would not be merely unusual, but extraordinary, if [judges] had not at least given opinions as to [legal] issues in their previous careers. Proof that a [judge's] mind at the time he joined the [c]ourt was a complete tabular as a . . . would be evidence of lack of qualification, not lack of bias.

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Laird, 409 U.S. at 835; *cf. Liteky v. United States*, 510 U.S. 540, 554 (1994) (Scalia, J.) ("[S]ome opinions [of a judge] acquired outside the context of judicial proceedings (for example, the judge's view of the law acquired in scholarly reading) will not suffice [for recusal]") (emphasis omitted); *Cipollone*, 802 F.2d at 660 ("If Judges could be disqualified because their background in the practice of law gave them knowledge of the legal issues which might be presented in cases coming before them, then only the least-informed and worst-prepared lawyers could ever be appointed to the bench."). Before taking the bench, we judges solemnly swear or affirm to "faithfully and impartially discharge and perform all the duties," 28 U.S.C. § 653, regardless of our background. To conclude that the district judge abused his discretion in this action would penalize judges for their background and undermine the oath. Thus, I believe we should reconsider *Republic of Panama* en banc.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-30687
Summary Calendar

D.C. Docket No. 98-CV-3279
00-CV-922 J

REPUBLIC OF PANAMA

Plaintiff – Appellee

v.

THE AMERICAN TOBACCO COMPANY, INC.; ET AL

Defendants

FORTUNE BRANDS INC, formerly known as American Brands Inc; R J REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION, individually and as successor by merger to The American Tobacco Company; BATUS INC; BATUS HOLDINGS INC; PHILIP MORRIS INCORPORATED; PHILIP MORRIS COMPANIES, INC; LORILLARD TOBACCO CO; LIGGETT GROUP INC; THE TOBACCO INSTITUTE INC; QUAGLINO TOBACCO AND CANDY COMPANY INC; J & R VENDING SERVICES INC

Defendants – Appellees

Appendix B

SAO PAULO STATE, of the Federative Republic of Brazil

Plaintiff – Appellee

v.

THE AMERICAN TOBACCO COMPANY; ET AL

Defendants

FORTUNE BRANDS INC, formerly known as American Brands Inc; R J REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION, individually and as successor by merger to The American Tobacco Company; BATUS INC; BATUS HOLDINGS INC; PHILIP MORRIS INCORPORATED; PHILIP MORRIS COMPANIES, INC; LORILLARD TOBACCO CO; LIGGETT GROUP INC; THE TOBACCO INSTITUTE INC; QUAGLINO TOBACCO AND CANDY COMPANY INC; J & R VENDING SERVICES INC

Defendants – Appellants

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans.

Before EMILIO M. GARZA, STEWART and PARKER, Circuit Judges.

Appendix B

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is reversed in part and vacated in part, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that plaintiffs-appellees pay to defendants-appellants the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: SEP 13 2001

A true copy
Test

Clerk, U.S. Court of Appeals,
Fifth Circuit

By s/ [illegible]
Deputy
New Orleans, Louisiana

APPENDIX C — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED JULY 17, 2000, AS REVISED JULY 20, 2000

REVISED, July 20, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 99-30685

REPUBLIC OF PANAMA,

Plaintiff-Appellee,

v.

THE AMERICAN TOBACCO COMPANY INC.; ET AL.,

Defendants,

and

FORTUNE BRANDS INC, formerly known as American Brands Inc; R. J. REYNOLDS TOBACCO COMPANY; RJR NABISCO INC; BROWN & WILLIAMSON TOBACCO CORPORATION, individually and as successor by merger to The American Tobacco Company; BATUS INCORPORATED; BATUS HOLDINGS INCORPORATED; PHILIP MORRIS INC; PHILIP MORRIS COMPANIES, INC; LORILLARD TOBACCO CO; LORILLARD INCORPORATED; LOEWS CORPORATION; THE TOBACCO INSTITUTE SERVICES, INC; LIGGET GROUP INC,

Defendants-Appellants.

Appendix C

Appeal from the United States District Court
for the Eastern District of Louisiana

July 17, 2000

Before EMILIO M. GARZA, DEMOSS, and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

The defendants appeal the district court's denial of their motion to recuse, the denial of their motion for a stay of proceedings, and the grant of the plaintiff's motion to remand the present action to state court. For the following reasons we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

In October 1998, The Republic of Panama ("Panama") filed the present underlying action in Louisiana state court. Panama alleges that the defendant tobacco companies conspired to conceal the addictiveness and health risks of tobacco. Panama seeks damages for past and future health costs for diseases caused by smoking. The defendant tobacco companies subsequently removed the case to federal court. In December 1998, Panama filed a motion to remand the case to state court. In January 1999, before responding to the motion for remand, the defendants moved to recuse the district court judge assigned to the case, Judge Carl Barbier ("Judge Barbier" or "district court").

Prior to his appointment to the district court, Judge Barbier was president of the Louisiana Trial Lawyer's

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Association ("LTLA") from approximately October 1989-October 1990. In April 1991, LTLA submitted an amicus brief on behalf of the plaintiffs in a product liability suit against tobacco companies. The LTLA amicus brief alleged that smoking was addictive and caused cancer. The LTLA amicus brief also stated that the tobacco companies have known the dangers of smoking for decades. Judge Barbier's name was listed on the brief as president of LTLA. In February 1999, Judge Barbier denied the motion to recuse, stating that he had not participated in the actual writing of the brief and that his term as president had ended when the brief was filed.

The defendants filed a motion with the Panel on Multidistrict Litigation ("MDL Panel") to have the current case consolidated for pretrial proceedings in the District Columbia. At the time the motion was filed there were six other suits ongoing in the federal court between foreign countries and these defendant tobacco companies. The defendants sought a stay of proceedings in the district court pending the MDL Panel's ruling on whether to transfer the case. Appellants claim that Panama consented to this motion. The district court denied the motion for a stay. The defendants argued their motion for transfer before the MDL panel on May 21, 1999. On May 28, 1999 the district court ordered that the case be remanded to state court. On June 10, 1999 the MDL Panel granted the defendants' motion for transfer of the proceedings.

Appendix C

Discussion

I. *Recusal*

Appellants argue that the district court abused its discretion in failing to grant its motion for recusal. The appellants contend that despite 28 U.S.C. § 1447(d) which states that remand orders are not reviewable on appeal, a remand order may be vacated if it is rendered following a district court's erroneous ruling on recusal. Appellees contend that a recusal order is not reviewable on appeal, because recusal decisions are subject to review only by an application for writ of mandamus.

A. Procedural Issues

First, we address the appellee's contention that a recusal decision may not be reviewed on appeal, but instead must be presented for review immediately by writ of mandamus. This court addressed a similar question in *Tramonte v. Chrysler Corporation*, 136 F.3d 1025, 1027-29 (5th Cir. 1998). In *Tramonte*, the plaintiff filed a class action lawsuit against Chrysler Corporation. The defendant, Chrysler, moved for recusal because the district court judge had family members who owned Chrysler vehicles and who were therefore potential class members. *Id.* at 1027. The district court judge declined to recuse stating that none of her family members were interested in becoming part of the class. *Id.* Following this ruling on recusal, the district court remanded the suit to state court. The defendant attacked the recusal decision by petitioning for a writ of mandamus, and the petition was denied. The defendant then appealed the order refusing to

recuse, and the remand to state court. In *Tramonte*, the court reviewed the district court judge's refusal to recuse even though the petition for writ of mandamus had been denied. This court concluded that "mandamus is only appropriate in extraordinary circumstances, typically where relief is unavailable on appeal . . . accordingly . . . [a party] is free to relitigate the recusal issue on appeal." *Id.* at 1028. Based on this reasoning we conclude that a party may appeal a recusal issue even when the party never applied for a writ of mandamus. The appellees cite various Seventh Circuit cases for the proposition that refusals to recuse may only be reviewed by applying for a writ of mandamus, however, this court has never adopted that viewpoint and this court's decision in *Tramonte* clearly supports a party's ability to litigate a recusal issue for the first time on appeal.

Next, 28 U.S.C. § 1447(d) generally insulates the district court's remand order from appellate review. However, this court held in *Tramonte* that if the district court judge should have recused himself any orders entered following disposition of the recusal motion should be vacated. *Id.* We found that when the district court judge should have been recused, vacating the remand order is a "ministerial task" unrelated to the remand order itself, and thus not prohibited by § 1447(d). *Id.* Appellees also concede that if this court finds that the recusal order itself is reviewable, and we decide on the merits that the district court judge should have been recused the remand order should be vacated on this basis. Thus, if we find that the district court judge should have been recused the remand order should be vacated. *Id.* at 1028.

We now address the merits of the district court's denial of the motion to recuse. Denial of recusal is reviewed for abuse of discretion. *Trevino v. Johnson*, 168 F.3d 173, 178 (5th Cir. 1999). Appellants argue that Judge Barbier should have recused himself pursuant to 28 U.S.C. § 455(a) ("§ 455(a)"). Section 455(a) states that a judge should recuse himself "in any proceeding in which his impartiality might reasonably be questioned." "In order to determine whether a court's impartiality is reasonably in question, the objective inquiry is whether a well-informed, thoughtful and objective observer would question the court's impartiality." *Trust Co. v. N.N.P.*, 104 F.3d 1478, 1491 (5th Cir. 1997) (citing *United States v. Jordan*, 49 F.3d 152, 155-58 (5th Cir. 1995)). The review of a recusal order under § 455(a) is "extremely fact intensive and fact bound," thus a close recitation of the factual basis for the appellants recusal motion is necessary. As this court has previously pointed out, the purpose of § 455(a), and the principle of recusal itself is not just to prevent *actual* partiality, but to "avoid even the appearance of partiality." *Jordan*, 49 F.3d at 155. The analysis of a § 455(a) claim must be guided, not by comparison to similar situations addressed by prior jurisprudence, but rather by an independent examination of the facts and circumstances of the particular claim. *United States v. Bremers*, 195 F.3d 221, 225 (5th Cir. 1999) (citing *Jordan*, 49 F.3d at 157).

As stated above, before he was appointed to the district court Judge Barbier was president of the LTLA from approximately October 1989-1990. In April 1991, LTLA filed an amicus brief in a product liability case against tobacco companies in Louisiana state court. Judge Barbier's name is listed on the "Motion for Leave to File Amicus Curiae Brief",

which was filed with the amicus brief. Judge Barbier is listed on this filing as President of the LTLA. Also listed as counsel for this motion is Michael St. Martin, who is counsel for Panama in the present action. The amicus brief itself which was attached to the motion was signed by another attorney and does not list Judge Barbier as counsel. While arguably the facts of the Louisiana product liability suit and the present suit may be distinguishable, the amicus brief contained general statements about tobacco companies. These statements included that tobacco use is addictive. The amicus brief also stated that the defendant tobacco companies should be held liable because they were negligent in producing a product that was more dangerous than it was intended to be, and that the companies knew or should have known of the addictive nature of their cigarettes. In the present case, Panama similarly asserts that as a result of defective and dangerous design, testing, manufacturing, marketing and practices, the product produced by the defendants is defective and unreasonably dangerous.

Judge Barbier informed the parties that while his name is listed on the motion to file the amicus brief, it was placed on the motion by mistake. Judge Barbier also stated that his term as president of LTLA had ended by the time the brief was filed, and that he had nothing to do with the researching, writing, signing, or approval of the brief. Judge Barbier explained that in the LTLA the decision to file an amicus brief and the contents of those briefs is exclusively governed by the LTLA Amicus Committee.

While a review of our case law has not revealed a case which is precisely on point, a somewhat similar factual

situation was at issue in *Bradshaw v. McCotter*, 785 F.2d 1327 (5th Cir. 1986), *rev'd*, 796 F.2d 100 (5th Cir. 1986). In *Bradshaw*, the defendant argued that a judge on Texas Court of Criminal Appeals should have been disqualified because at the time of the defendant's conviction his name was listed on a brief as State Prosecuting Attorney in the defendant's appeal. *Id.* at 1328. The judge explained that he had not actually participated in the prosecution of the case at all, but his name had appeared on the brief simply as a matter of courtesy and protocol. We found that "whether [the judge] actually participated in [the] prosecution must be found to be immaterial." *Id.* at 1329. We further held that the appearance of the judge's name on the brief undermined the appearance of the judge's neutrality. *Id.*

In the present case, while there is no evidence of actual bias we must consider whether a reasonable person might harbor doubts about the trial judge's impartiality. The fact that Judge Barbier's name was listed on a motion to file an amicus brief which asserted similar allegations against tobacco companies to the ones made in this case may lead a reasonable person to doubt his impartiality. Also, Judge Barbier was listed on this filing with the attorney who is currently representing the Republic of Panama. The trial judge's assertions that he did not participate directly in the writing or researching of the amicus brief do not dissipate the doubts that a reasonable person would probably have about the court's impartiality. We acknowledge that this is a close case for recusal. However, we have previously held that if the question of whether § 455(a) requires disqualification is a close one the balance tips in favor of recusal. *In Re: Chevron*, 121 F.3d 163, 165 (5th Cir. 1997).

Accordingly, we hold that a reasonable person might harbor doubts about the trial judge's impartiality, and thus the district court abused its discretion in denying the defendants' motion to recuse.

Having found that the district court should have granted the defendant's motion to recuse we now address the district court's subsequent decisions to remand the case to state court, and its decision to stay the proceedings to await a decision on the defendant's motion before the MDL Panel to transfer the case. Because the district court should have recused itself the remand order and denial of the motion to stay proceedings, both entered following the disposition of the recusal motion should be vacated. Consequently we do not address the merits of the remand motion or the denial of the motion for stay. *See Tramonte*, 136 F.3d at 1028. ("if [the district court judge] should have recused [himself], any orders [he] entered following disposition of the recusal motion should be vacated.").

CONCLUSION

For the above reasons, we VACATE the order remanding this case to state court and REMAND this case to the Eastern District of Louisiana. We further direct the Chief Judge of the Eastern District of Louisiana to reassign this case for further proceedings before a different district judge in that district.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-30685
D.C. Docket No. 98-CV-3279-J

REPUBLIC OF PANAMA

Plaintiff – Appellee

v.

THE AMERICAN TOBACCO COMPANY INC; ET AL

Defendants

and

FORTUNE BRANDS INC, formerly known as American Brands Inc; R J REYNOLDS TOBACCO COMPANY; RJR NABISCO INC; BROWN & WILLIAMSON TOBACCO CORPORATION, individually and as successor by merger to The American Tobacco Company; BATUS INCORPORATED; BATUS HOLDINGS INCORPORATED; PHILIP MORRIS INC; PHILIP MORRIS COMPANIES, INC; LORILLARD TOBACCO CO; LORILLARD INCORPORATED; LOEWS CORPORATION; THE TOBACCO INSTITUTE INC; QUAGLINO TOBACCO AND CANDY COMPANY, INC; J & R VENDING SERVICES, INC; LIGGET GROUP INC,

Defendants – Appellants

Appendix C

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans.

Before EMILIO M. GARZA, DeMOSS and STEWART, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is vacated, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court. IT IS FURTHER ORDERED that the Chief Judge of the Eastern District of Louisiana reassign this cause before a different district judge in that district.

IT IS FURTHER ORDERED that plaintiff-appellee pay to defendants-appellants the costs on appeal to be taxed by the Clerk of this Court.

A true copy
Test

Clerk, U.S. Court of Appeals,
Fifth Circuit

By s/ [illegible]
Deputy
New Orleans, Louisiana

APPENDIX D — MINUTE ENTRY OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DATED MAY 25, 2000 AND FILED MAY 26, 2000

MINUTE ENTRY
BARBIER, J.
MAY 25, 2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 00-0922
98-3279 C/W

SECTION: "J"(5)

THE STATE OF SAO PAULO OF THE FEDERATIVE REPUBLIC OF BRAZIL

VERSUS

THE AMERICAN TOBACCO COMPANY, INC., ET AL

Before the Court are two opposed motions: defendants' **Motion to Recuse** (00-922 Rec. Doc. 7); and plaintiff's **Motion to Remand** (98-3279 Rec. Doc. 72). The motions, set for hearing on May 24, 2000, are before the Court on briefs without oral argument. Additionally, while not re-urged as a new motion to stay this case pending the decision of the MDL Panel, defendants have also filed a "Notice of Proceedings Before the MDL Panel" (98-2379 Rec. Doc. 89),

suggesting that this Court should refrain from ruling on the Motion to Remand pending a decision on transfer by the MDL Panel, which the Court addresses briefly below.

I. *Renewed Request for Stay*

Defendants urge this Court to stay this matter pending a decision by the MDL panel on whether this matter should be transferred as a "tag-along" with other cases being consolidated before Judge Friedman in the District of District of Columbia, based chiefly on the argument that failure to do so will result in inconsistent rulings. However, this reasoning has been mooted by the passage of time. To date, two other motions to remand have been granted by transferor courts (one being *Republic of Panama*, 98-3279). Thus, if the transferee court were to deny all of the other motions to remand based on similar arguments, it would already be too late to avoid inconsistent rulings. If, on the other hand, the transferee court grants the motions to remand, there will be no problem of inconsistent results.

JPML Panel Rule 1.5 states:

> The pendency of a motion, order to show cause, conditional transfer order or conditional remand order before the Panel concerning transfer or remand of an action pursuant to 28 U.S.C. § 1407 does not affect or suspend orders and pretrial proceedings in the district court in which the action is pending and **does not in any way** limit the pretrial jurisdiction of that court.

181 F.R.D. 1, 3 (1988) (emphasis added).

While defendants in their papers filed with the Court seem to grudgingly acknowledge that the foregoing is the law, at the same time they seem to suggest that notwithstanding this, a stay pending a decision by the MDL Panel is somehow favored. This suggestion is conclusively undermined by the transcript of proceedings before the MDL Panel held on May 21, 1999, and included as Exhibit H to defendants' "Notice of Proceedings". During that hearing, Chairman Judge Nangle, in discussing the status of a pending motion to remand in another transferor district, stated: "[The transferor district judge] has every right to reach a decision on that motion, write it out today, yesterday, maybe has done so. You understand that." Exh. K, 99:17-19. The Chairman continues: "There is not one thing this Panel ever does, other than to tell these [transferor] judges, decide whatever motions you want, you have authority, etcetera, etcetera." Exh. K, 99:21-25. In fact, the Chairman goes on to lament the fact that transferor judges often choose (either formally or informally) not to exercise their continued jurisdiction, and that attorneys are unaware that the transferor's jurisdiction continues:

> [L]awyers who practice in front of this Panel, even those who are here quite frequently don't seem to understand that the transferror [sic] judges, for whatever reason and for good reasons, for crying out loud, don't act on these motions to remand very often while — they almost always stay their actions until the Panel acts. That is contrary. They don't have to do it that way but that is the way they do it. So as a result, we end up centralizing cases in many instances where

> there are pending motions to remand because the particular transferror [sic] court has not decided to take any action.

Exh. K, 106:16-25.

Chairman Judge Nangle's statements, if anything, reflect a preference that transferor courts consider, not stay, pending motions to remand, to avoid the judicial inefficiency and delay incurred when cases which will ultimately be remanded to state court are centralized for a period before the transferee judge. Such reasoning is consistent with the jurisprudence which requires district courts to consider jurisdiction as a threshold issue. See *Copling v. The Container Store, Inc.*, 174 F.3d 590, 595 (5th Cir. 1999). Accordingly, the Court will not refrain from ruling on the motions now before it.

II. ***Motion to Recuse***

In their motion to recuse the district court judge, defendants incorporate by reference the motions and memoranda submitted in connection with their Motion to Recuse filed in the consolidated case, Civil Action 98-3279, *Republic of Panama v. American Tobacco, et al.*, which the Court denied for reasons stated in open court following oral argument on the motion held on February 3, 1999. The Court likewise adopts the reasons given for the denial of the Motion to Recuse filed in *Republic of Panama*, and accordingly, finds that the Motion to Recuse filed herein should be denied.

III. ***Motion to Remand***

Defendants removed this case to federal court based upon two grounds: first, they argue that plaintiff's complaint states claims which fall within the federal common law of foreign relations, and therefore presents a federal question (28 U.S.C. § 1331); and second, they argue that diversity jurisdiction is present because this case presents an action between a foreign state as plaintiff and citizens of different states, and the amount in controversy exceeds $75,000 (28 U.S.C. § 1332(a)(4)).

Plaintiff has filed a motion to remand arguing that removal to this Court is improper because (1) its complaint presents no federal question that would confer jurisdiction on this Court; and (2) that the presence of a U.K.-based defendant, B.A.T. Industries, precludes diversity jurisdiction pursuant to 28 U.S.C. 1332(a)(4).

A. ***28 U.S.C. § 1331 — Federal Question Jurisdiction***

In their notice of removal, defendants allege that because this action implicates the vital economic and sovereign interests of a foreign government, it falls within the federal common law of foreign relations, and therefore presents a federal question. In its ruling granting the motion to remand filed in *Republic of Panama*, the Court discussed at length the reasons why that case did not fall within the federal common law of foreign relations. There are no facts in the case now before the Court that distinguish this case from *Panama* with respect to that issue, and the Court therefore adopts the reasoning in its prior opinion, which it declines

to re-state here.[1] Thus, the Court finds that the federal law of foreign relations does not provide a basis for jurisdiction over this action pursuant to 28 U.S.C. § 1331.

B. *28 U.S.C. § 1332 – Diversity Jurisdiction*

The arguments presented in support of a finding of diversity jurisdiction are twofold. First, defendants argue that 28 U.S.C. § 1332(a)(4) provides original jurisdiction because plaintiff's complaint is brought by a foreign state against citizens of domestic states. In this regard, defendants further argue that the foreign citizenship of U.K.-based defendant B.A.T. Industries does not preclude application of this provision. Second (and alternatively) defendants assert that the citizenship of B.A.T. Industries should be overlooked because it has been fraudulently joined.

Title 28, section 1332(a) provides in pertinent part:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interests and costs, and is between —
>
> * * * *
>
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

1. For the full opinion, see 1999 WL 350030 (E.D. La.).

Despite the fact that the plain language of this statute does not confer original jurisdiction in cases where a foreign state has sued a citizen of another 1603(a) foreign state (as occurred in the instant case), defendants argue that the legislative history of the provision mandates a finding that it applies under that scenario as well, and thus confers original jurisdiction over plaintiff's claims against B.A.T. Industries.

However, it is well-settled that section 1332 requires *complete* diversity. *Strawbridge v. Curtiss*, 3 Cranch 267, 2 L.Ed. 435 (1806). The United States Supreme Court has recognized that the presence of two foreign entities on opposing sides of an action renders diversity incomplete. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 580, 119 S. Ct. 1563, 1568 n.2 (1999). Therefore, the Court finds the presence of defendant B.A.T. Industries, a U.K. citizen, defeats the diversity alleged by defendants.

As for the contention by defendants that B.A.T. was fraudulently joined, this mere allegation without facts to substantiate it cannot provide a basis for a finding of fraudulent joinder, and defendants have provided no such facts in either their Notice of Removal or opposition memorandum to the Motion to Remand.[2] Thus, no basis for federal jurisdiction exists under either 28 U.S.C. § 1331 or § 1332. Accordingly;

2. While defendants have urged several compelling arguments in support of their contention that the Louisiana-based distributors were fraudulently joined, those arguments have no application to B.A.T. Industries, which is alleged to be a manufacturer. Accordingly, it is not necessary for the Court to reach the issue of whether the Louisiana distributors were fraudulently joined.

Appendix D

IT IS ORDERED that defendants' **Motion to Recuse** should be and is hereby **DENIED**;

IT IS FURTHER ORDERED that, pursuant to 28 U.S.C. § 1447(c), plaintiff's **Motion to Remand** should be and is hereby **GRANTED**, and this matter is hereby **REMANDED** to the Civil District Court for the Parish of Orleans.

s/ Carl J. Barbier

APPENDIX E — EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DATED FEBRUARY 3, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Docket No. 98-CV-3279-J

REPUBLIC OF PANAMA

v.

THE AMERICAN TOBACCO CO., INC. ET AL

New Orleans, Louisiana
February 3, 1999, 9:30 a.m.

TRANSCRIPT OF PROCEEDINGS
HEARD BEFORE THE HONORABLE CARL J. BARBIER
UNITED STATES DISTRICT JUDGE PRESIDING

* * *

[21] * * *

THE COURT: Well, that's not what I read. I hadn't read the *Gilboy* brief until — the first time I actually read the *Gilboy* brief was when this issue came up, to my knowledge. I absolutely believe I had never read that brief before. Or ever saw it before.

* * *

Appendix E

[37] * * *

THE COURT: So that is in the record, will form part of the record here. But the facts in essence are as follows: That at the time the *Gilboy* brief was filed in 19, apparently [38] in April, at the end, 30 of 1991, first of all, I was not the president of Louisiana Trial Lawyers Association. I was past president of Louisiana Trial Lawyers Association, having left that office in September, October of the previous year.

Secondly, I had absolutely nothing to do with researching, writing, signing or approving this brief in any manner; although obviously my name appears on it through some mistake. I can't account for how or why it's on there, other than someone must have mistakenly believed I was president of the LTLA and listed my name on there for that reason.

Interestingly my name appears apparently on the motion for leave to file the amicus brief, not on the brief itself. The brief is signed and apparently prepared by Mr. Adolph J. Levy. And the motion for leave was signed apparently by Mr. Lawrence Kullman who at that time was chairman, appeared as chairman of the Amicus Committee of Louisiana Trial Lawyers Association.

The other names that appear on the Motion for Leave are all members of the Amicus Committee of Louisiana Trial Lawyers Association with one exception, and that being Ms. Leah Guerry who was then executive director of the Louisiana Trial Lawyers Association.

Appendix E

The procedure at that time was that the Amicus Committee and the members of the Amicus Committee alone decided whether and when to file amicus briefs. It was not something [39] that was passed by the Board of Governors or Executive Committee or whatever. That's how it was done. To my knowledge that's probably how it's still done, I'm not sure.

But in any event, that's how it was done then. And I know that as I said, and I'll say this again for the record, I had nothing to do with that. I didn't research or write this brief or sign it, I didn't approve it in any way or concur in its being filed in any way. I never had the occasion to do that. It wasn't something that had to be approved by anyone other than the eight or nine members of the Amicus Committee, however number there are.

As a matter of fact, I'll say this for the record, too. I don't believe there's any basis for recusal under 455(b)(1) which says that a judge shall disqualify himself where he has personal knowledge of the disputed evidentiary facts concerning the proceedings. I have absolutely no personal knowledge of any of the disputed or alleged facts in the *Gilboy* case. None. Period. All I know about is what I have read in the *Gilboy* brief and in the reported decision now and in what you all have set forth in your memoranda.

I have never represented any party in any tobacco related litigation, I have never been associated with, other than by virtue of being members of the same organization, I have never been associated in legal practice or in any case with any of the other lawyers listed there or the lawyers in [40]

this case; and it seems to be, the allegation seems to be somehow that because my name appears near or next to Mr. Mike St. Martin's name that that somehow is the grounds for recusal.

I know Mr. St. Martin obviously. I've never been associated with Mr. St. Martin in 28 years of practicing law in a single case, not one. Except for the mistaken or inadvertent listing of my name on this motion for leave to file the amicus brief, I have never taken or expressed any position or opinion regarding the tobacco industry or any of the issues raised in this litigation.

• • • •

APPENDIX F— EXCERPTS FROM TRANSCRIPT OF STATUS CONFERENCE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DATED DECEMBER 21, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS, LOUISIANA

CIVIL ACTION
NO. 98-3279

SECTION "J"

THE REPUBLIC OF PANAMA

VERSUS

THE AMERICAN TOBACCO CO., INC., et al

Status conference held on Monday, December 21, 1998, in conference room, the Honorable Carl Barbier, U.S. District Judge, presiding.

• • •

[7] • • •

THE COURT: Does anyone else want to chime in on this one?

Let me just state some facts as I appreciate, as I recall them, for the record.

First of all, I personally had nothing to do with writing this brief, nothing whatsoever. My name is listed on the motion and, I guess — is it on the brief, too? It looks like just on the motion.

MS. ROUEN: I think that's correct.

THE COURT: Apparently this brief was done by Mr. A. J. Levy on behalf of the Louisiana Trial Lawyers Association.

[8] I can't explain actually how or why my name is listed on there as president of the Louisiana Trial Lawyers Association. I believe the practice, as I recall, was, as a matter of form, to just list whoever happened to be president at that time with the Amicus committee on the briefing on the motion.

However, since I just noted — and I didn't realize the date here until I just read this a few minutes ago and looked at the date this was filed, which looks like it was April 30th or May 1st, 1991 — I was no longer president of LTLA, so, whoever prepared this, who I suppose was either Mr. Kullman, who signed the motion as chairman of the Amicus Committee, or Mr. Levy, who apparently prepared the brief, they mistakenly or inadvertently listed me as president of LTLA. I was president of that organization from sometime in the fall — I can't give you the exact dates, but it was either September or October because that's when the term always ends — of 1989 until the fall of 1990.

So, when this was filed, I was no longer president of LTLA. I know I had no personal involvement in the writing

of this brief. I think I was vaguely aware of this case. I think I remember reading the Supreme Court decision when it came out later. I can't even tell you, as we sit here, honestly what the holding was in that case, what the real issue was.

[9] I didn't represent any party in that case. I have never represented any parties for or against any tobacco company. I have never been involved in a tobacco case one way or another in my whole legal career.

So, with those facts on the record, I just don't see where objectively my impartiality could be questioned.

There's another issue here that I thought about, and that is, I'm not sure that even if I had prepared the brief and signed the brief that that would be grounds for recusal, because if you think about it, I suppose then that would open the door to Pandora's box, because after practicing law for 28 or 29 years, I have taken many different positions on different legal issues that, I guess, any party in any case could find a brief or a lawsuit or a memoranda that I filed somewhere along the way, and if they thought it conflicted with a position involving their client in a case now, that would open every judge in this court to recusal on a Pandora's box of issues, it seems to me, if that was the standard, that at sometime in the past, as a lawyer, you had signed a pleading taking a position on a issue that may or may not be involved somehow in a totally unrelated case ten years later.

That's just how I'm looking at it, Debbie, if you want to respond.

• • • •

APPENDIX G — MOTION OF THE LOUISIANA TRIAL LAWYERS ASSOCIATION FOR LEAVE OF COURT TO FILE AMICUS CURIAE BRIEF IN *GILBOY v. THE AMERICAN TOBACCO COMPANY, et al.* DATED APRIL 30, 1991

SUPREME COURT OF LOUISIANA

DOCKET NUMBER 90 C 2686

ROBERT C. GILBOY

VERSUS

THE AMERICAN TOBACCO COMPANY, ET AL.

MOTION OF THE LOUISIANA TRIAL LAWYERS ASSOCIATION FOR LEAVE OF COURT TO FILE AMICUS CURIAE BRIEF

NOW INTO COURT comes Lawrence S. Kullman, Chairman of the Amicus Curiae Committee of the Louisiana Trial Lawyers Association, who respectfully requests leave of court on behalf of the Louisiana Trial Lawyers Association to file an amicus curiae brief in the above captioned matter. The legal issue presented is one which significantly impacts the rights of victims of product caused injuries and is an important matter of Louisiana law. As such, the undersigned respectfully requests that this Court grant the Louisiana Trial Lawyers Association leave to file an amicus curiae brief.

Appendix G

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No. 01-835

Supreme Court, U.S.
FILED
JAN 31 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

THE STATE OF SAO PAULO OF THE FEDERATIVE REPUBLIC OF BRAZIL

Petitioners,

— v. —

THE AMERICAN TOBACCO CO., ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

As discussed below, by virtue of consolidated proceedings now pending in the D.C. Circuit (the decision of which is expected shortly), either the instant petition will become moot or the case will be put in a procedural posture clearly rendering it an inappropriate vehicle for review of any question Petitioner claims it presents. *See* pp. 17-19, *infra*.-Moreover, this case does not in any event present the question stated in the petition; this is not a case — such as Petitioner contends — where recusal was directed simply because a district judge had "a 'pre-judicial association' with a position or counsel." Pet. i (Question Presented). Rather, Respondents submit that the following question more accurately reflects the factual grounds underlying the Fifth Circuit's holding that recusal was required in this case:

> Did the Fifth Circuit correctly hold, based upon its "extremely fact intensive and fact bound .... examination of the facts and circumstances of the particular claim" (Pet. App. 34a), that the district court abused its discretion when it failed to recuse notwithstanding the appearance of partiality resulting from the judge, pre-appointment, having held key leadership roles in an organization which, in an earlier tobacco case, had submitted an *amicus* brief, under motion bearing the judge's name as President, expressing strident positions adverse to many of the same defendants in this case on issues common to both cases?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Philip Morris Companies Inc. does not have any parent corporations and there is no publicly held company that owns 10% or more of Philip Morris Companies Inc.'s stock.

Respondent Philip Morris Incorporated has the following parent corporation:

Philip Morris Companies Inc.

Philip Morris Companies Inc. is the only publicly held company that owns 10% or more of Philip Morris Incorporated's stock.

Respondent R.J. Reynolds Tobacco Company has the following parent corporation:

R.J. Reynolds Tobacco Holdings, Inc.

R.J. Reynolds Tobacco Holdings, Inc. is the only publicly held company that owns 10% or more of R.J. Reynolds Tobacco Company's stock.

Respondent Brown & Williamson Tobacco Corporation has the following parent corporations:

B.A.T Industries p.l.c.
BATIC Inc.
BATUS Holdings Inc.
BATUS Tobacco Services, Inc.
British American Tobacco p.l.c.
British American Tobacco (1998) Ltd.
British-American Tobacco (Holdings) Ltd.
Louisville Securities Ltd.

British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of Brown & Williamson Tobacco Corporation's stock.

Respondent BATUS Holdings, Inc. has the following parent corporations:

B.A.T Industries p.l.c.
British American Tobacco p.l.c.
British American Tobacco (1998) Ltd.
British-American Tobacco (Holdings) Ltd.
Louisville Securities Ltd.

British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of BATUS Holdings, Inc.'s stock.

Respondent BATUS, Inc. has the following parent corporations:

B.A.T Industries p.l.c.
BATUS Holdings, Inc.
British American Tobacco p.l.c.
British American Tobacco (1998) Ltd.
British-American Tobacco (Holdings) Ltd.
Louisville Securities Ltd.

British American Tobacco p.l.c. is the only publicly held company that owns 10% or more of BATUS, Inc.'s stock.

Respondent American Brands, Inc. (now known as Fortune Brands, Inc.) does not have any parent corporations and there is no publicly held company that owns 10% or more of American Brands, Inc.'s stock.

Respondent The Tobacco Institute, Inc. does not have any parent corporations and there is no publicly held company that owns 10% or more of The Tobacco Institute, Inc.'s stock.

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STATEMENT OF THE CASE

The subject of the instant petition, the decision of the Fifth Circuit in *Sao Paulo* v. *American Tobacco*, 250 F.3d 315 (5th Cir. 2001) (Pet. App. 17a-28a), is a two-paragraph *per curiam* order predicated upon a prior decision of the same court a year earlier in an appeal presenting the identical issues. *Republic of Panama* v. *American Tobacco*, 217 F.3d 343 (5th Cir. 2000) (Pet. App. 29a-39a).* Accordingly, it is necessary to set forth the proceedings and decision in the *Panama* case as well as *Sao Paulo* in order to have an understanding of the decision below. Moreover, *Panama* and *Sao Paulo* are but two of the many substantially identical foreign-government cases filed against the tobacco companies that have been consolidated for pretrial purposes in the District of Columbia; the proceedings in the District of Columbia are highly germane to the mootness/appropriateness-of-review issue discussed below and are therefore also set forth herein.

A. *Panama*

1. The *Panama* complaint

Panama was the second of what are now some 36 foreign governments that have filed lawsuits in American courts against the American tobacco industry. These foreign-government lawsuits all claim that the tobacco companies concealed the health risks of smoking, and that, had the foreign governments been aware of smoking's health risks, they would have adopted different policies with respect to smok-

---

* Citations in the form "Pet. App. __" are to the appendix attached to the petition. Citations in the form "Resp. App. __" are to the appendix attached to this opposition. Citations in the form "Sao P. RE__:__" are to the Record Excerpts submitted to the Fifth Circuit in the *Sao Paulo* appeal. Citations in the form "Pan. RE__:__" are to the Record Excerpts submitted to the Fifth Circuit in the *Panama* appeal. Citations in the form "Pan. R__:__" are to the complete Record on Appeal in *Panama*.

ing; these policies would have led to decreased smoking by their citizens; and this reduced smoking would have led to lower health care costs for the foreign governments. (Pan. RE8:99-100,122-23,136).* The foreign governments thus seek through these lawsuits to recover on a mass-aggregated basis for medical expenses paid with respect to hundreds of thousands — if not millions — of unidentified individual smokers, while seeking to strip defendants of the defenses that would be available to them if sued by the smokers themselves. (Pan. RE8:98,100,122,126,128,136-37).

On June 10, 1999, the Judicial Panel on Multidistrict Litigation (on defendants' motion) directed that all such actions pending in the federal courts be consolidated for pretrial purposes in the District of Columbia. (Pan. RE17:275-78). As to those of the foreign-government cases that were originally brought in the federal courts, the District of Columbia District Court subsequently granted dismissal for failure to state either federal or state law claims; the D.C. Circuit affirmed those dismissals; this Court denied certiorari. *In re Tobacco (Guatemala)*, 83 F. Supp. 2d 125, 126 (D.D.C. 1999), *aff'd sub nom.*, *Republic of Guatemala* v. *Tobacco Institute*, 249 F.3d 1068 (D.C. Cir.), *cert. denied*, 122 S. Ct. 463 (2001).

A number of the foreign government plaintiffs — including Panama and Sao Paulo — however, originally brought suit not in federal court, but in hand-picked state-court forums bereft of any connection to the parties or the matters in dispute. *See*, *e.g.*, *Republic of Bolivia* v. *Philip Morris*, 39 F. Supp. 2d 1008, 1009 (S.D. Tex. 1999) (noting upon removal that "the Court can hardly imagine why the Republic of Bolivia elected to file suit in the veritable hin-

* The *Panama* complaint and the later-filed *Sao Paulo* complaint are virtual carbon copies of each other. To avoid repetition, cites herein are to either complaint as appropriate. The same points apply to both.

terlands of Brazoria County, Texas. The Court seriously doubts whether Brazoria County has ever seen a live Bolivian … even on the Discovery Channel.").

As for the *Panama* lawsuit, it was originally filed on August 26, 1998 in Louisiana state court (Orleans Parish). After defendants removed the case to the Eastern District of Louisiana — in part on the grounds that the complaint contained allegations purporting to raise a federal antitrust claim — Panama voluntarily dismissed its original action. Two months later, however, Panama refiled a complaint in the same state court, this time omitting the federal antitrust allegations. Defendants again removed the case on November 5, 1998 — both on diversity and an additional federal-question ground — and the action was assigned to District Judge Carl J. Barbier. On December 3, 1998, Panama moved to remand.

2. Defendants' recusal motion

Before responsive papers were filed upon Panama's remand motion, defendants on January 5, 1999 filed a motion seeking Judge Barbier's recusal pursuant to 28 U.S.C. § 455. (Pan. R2:247-91). The basis of the motion was the appearance of partiality created by the public association of Judge Barbier with a Louisiana Trial Lawyers Association *amicus* brief filed in 1991 with the Louisiana Supreme Court in *Gilboy* v. *American Tobacco Co.*, a case involving a number of the same defendants here.

The facts underlying the recusal motion may briefly be summarized. Before his confirmation as a federal judge in September 1998, Judge Barbier was a member of the Louisiana Trial Lawyers Association. He served a one-year term as President of that organization from the fall of 1989 until the fall of 1990. Thereafter, he served as Past President and as a member of the Association's Executive Committee. (Pan. RE7:62-63,91-92).

On April 30, 1991, the Association submitted an *amicus* brief to the Louisiana Supreme Court in a product-liability case styled *Gilboy* v. *American Tobacco Co.* (Resp. App. 6a-29a), an action against a number of the same tobacco defendants named here. *See* 582 So. 2d 1263 (La. 1991). The Louisiana Trial Lawyers Association's motion to file that brief was subscribed:

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>
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>
> * * *

(Resp. App. 2a (addresses and phone numbers omitted)). Mr. St. Martin is now counsel for Panama and Sao Paulo in these cases. The official reported decision of the Louisiana Supreme Court in *Gilboy* lists "Lawrence S. Kullman, Carl Joseph Barbier, Michael X. St. Martin, Adolph J. Levy, New Orleans, for Louisiana Trial Lawyers Ass'n amicus curiae." *Gilboy*, 582 So. 2d at 1263-64.

Gilboy was an important tobacco case involving four of the same defendants named here* and many of the same disputed factual and legal issues pleaded in these cases. The *Gilboy amicus* brief identified the following among the issues in the case:

1. Should the defendants have warned that smokers could become addicted to nicotine?

2. Was plaintiff's failure to stop smoking "voluntary"?

3. Did plaintiff fail to stop smoking because he was addicted to nicotine?

4. What percent of fault lies with plaintiff and what percent of fault lies with defendants?

5. Assuming, for the sake of argument, that actual knowledge of the defendants was required, did defendants have actual knowledge that they were causing people to become addicted?

6. Should defendants have known of the scientific literature of the 1900s that smokers were becoming addicted to nicotine?

7. Were defendants negligent in failing to warn the plaintiff of health and addiction risks?

8. Are cigarettes unreasonably dangerous?

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* The American Tobacco Company, R.J. Reynolds Tobacco Company, Lorillard, Inc., and The Tobacco Institute.

(Resp. App. 28a-29a). The *Panama* complaint (and the *Sao Paulo* complaint) raise many of the same and similar issues that were raised by the *Gilboy* brief.*

Then, including in a section titled "Facts," the *Gilboy amicus* brief — which Petitioner tellingly chose to omit from the appendix to its petition — expressed starkly unfavorable views with regard to the tobacco companies, often in the most strident terms. For example:

- "The companies will continue to *sell cancer* until they know that they will have to pay for the needless deaths and the needless suffering that they inflict." (Resp. App. 12a-13a) (emphasis added).

- "In our view, cigarette manufacturers, but not members of the public, knew from the early 1900s that cigarettes were addictive." (Resp. App. 9a).

- "[D]efendants should not be able to benefit from the addiction that they caused." (Resp. App. 9a).

- "They refuse to place any warning labels on any cigarettes that they export unless the importing country requires the warnings. They don't even warn about cancer. So much for their good faith." (Resp. App. 12a).

- "[T]he original warnings on cigarettes were indeed inadequate. The tobacco companies, for obvious reasons, never gave the following warning: '*We will get you as*

* For example, the *Panama* (and *Sao Paulo*) complaints allege that cigarettes were unreasonably dangerous (Pan. RE8:99), that defendants had notice of potential health hazards since at least the late 1930s (Pan. RE8:106), and that defendants had actual knowledge that nicotine users were addicted. (Pan. RE8:108). *See also* Pan. RE8:98,110 (addictiveness); Pan. RE8:124,125 (unreasonably dangerous); Pan. RE8:98-99,107, 114,121,123,124,134.

hooked on cigarettes as you would be on heroin.'" (Resp. App. 14a) (emphasis added).

- "Cigarettes are unreasonably dangerous per se because they *make people addicts and because they kill people.*" (Resp. App. 22a) (emphasis added).

- "The defendants are liable under strict liability. They are also liable for their negligence in producing a product that was more dangerous than it was intended to be. They are also liable because they knew or should have known of the addictive character of their cigarettes and were therefore negligent in failing to warn smokers that their cigarettes convert smokers into addicts." (Resp. App. 22a).

- "[Cigarettes] are unreasonably dangerous per se." (Resp. App. 23a).

- "Were the defendants also negligent in failing to warn about the addiction? Certainly they were." (Resp. App. 23a).*

Nonetheless, Judge Barbier informed defendants following the recusal issue being raised that he had never actually acted as counsel in *Gilboy* and that his term as President of the Association had ended six months before the *amicus*

* Again, the factual *conclusions* asserted in the *Gilboy amicus* brief bear striking similarity to the factual *allegations* asserted in the *Panama* (and *Sao Paulo*) complaint. Compare, *e.g.*, Pan. RE8:123 ("Each of the Defendants knew, or should have known, about the adverse impact of the inhalation of cigarette smoke on the health of both users and bystanders. Instead of warning Plaintiff, intended users and the general public about these dangers, the Defendants ignored, or actively and fraudulently concealed such information ... in order to sell cigarettes .... Additionally, the Defendants not only concealed the hazards of cigarette smoking but also actively represented cigarettes as safe. Such actions and/or inactions constitute gross negligence ...."); Pan. RE8:125 ("Cigarettes are inherently, abnormally, and unreasonably dangerous"); *see also* Pan. RE8:99,100,126.

brief was filed. (Pan. RE6:46). Upon argument of the motion, Judge Barbier further stated that exclusive responsibility for submitting *amicus* briefs rested with the Association's Amicus Committee, not with him. (Pan. RE7:90-92). Judge Barbier did not question, however, that he *did* continue to serve on the Association's Executive Committee and Board of Governors — its key governing bodies — at the time the brief was filed and thereafter, and was Past President at the time of filing. (Pan. RE7:62-63). Nor did he at any time in any way disavow holding the strenuous anti-tobacco company sentiments expressed in that *amicus* brief. Nevertheless, as set forth below, Judge Barbier denied recusal.

3. Proceedings in the *Panama* action

As noted above, the *Panama* action was removed on November 5, 1998, and assigned to Judge Barbier; on December 3, 1998, Panama filed its remand motion; defendants for the reasons set forth above — and before Judge Barbier had taken any action in the matter — on January 5, 1999, then filed their motion for recusal. That motion was denied on February 3, 1999.

By the beginning of February 1999, the number of lawsuits brought in American courts by foreign governments against the tobacco industry had jumped from two to six. Given the multiplicity of substantially similar actions pending in six different federal courts, defendants in February 1999 moved before the Judicial Panel on Multidistrict Litigation to have all such actions consolidated for pretrial proceedings in the District of Columbia federal court pursuant to 28 U.S.C. § 1407. (Pan. R3:320-42). Defendants' papers before the MDL Panel emphasized the importance of avoiding inconsistent pretrial rulings in these matters involving sovereign governments as litigants in American courts.

Defendants thereupon filed a motion before the district court in the *Panama* action seeking — in light of the pendency of the MDL motion — to continue without date any hearing on Panama's remand motion. (Pan. R3:314-15). In communication with defendants' counsel, Panama actually *consented* to this motion, and the district court was so advised. (Pan. R3:314-15). Nevertheless, on February 19, the district court *denied* this unopposed motion — citing (without further explication) "the procedural history of this case to date." (Pan. RE4:21-22). The district court's order stated that it was without prejudice to defendants upon oral argument of the remand motion requesting that the court withhold ruling. (Pan. RE4:21-22).

Accordingly, on February 23, 1999, defendants proceeded not only to interpose papers in opposition to Panama's remand motion, but to file a cross-motion (with supporting papers) asking that ruling on the remand motion be withheld pending the MDL Panel's resolution of the MDL motion. Similar stays were sought in each of the other actions subject to the MDL motion (other than the first-filed *Guatemala* case, which was already pending in the District of Columbia — the proposed transferee court — having been brought there). In the two other removed actions, the courts either stayed all proceedings or themselves granted transfer to the District of Columbia under 28 U.S.C. § 1404. Thus: (1) in the action brought by Venezuela, the Southern District of Florida Court on April 28, 1999 stayed all proceedings pending resolution of the MDL motion (Pan. RE10:163-65); and (2) in the action brought by Bolivia, the Southern District of Texas Court on March 1, 1999, even before a stay application was made, *sua sponte* transferred the case in the interest of justice pursuant to 28 U.S.C. § 1404 to the District of Columbia for *all* purposes. *Republic of Bolivia* v. *Philip Morris*, 39 F. Supp. 2d 1008 (S.D. Tex. 1999). Stay motions were also granted in each of the other potential MDL cases not already pending in the Dis-

trict of Columbia. (Pan. RE11:166-67 (*Nicaragua* case); (Pan. RE12:168 (*Thailand* case)).*

Judge Barbier, however, did *not* grant defendants' stay motion, but rather scheduled argument on that motion for March 17, 1999 simultaneous with argument on the remand motion itself — and argument on those motions was indeed held on that date. Shortly thereafter, the MDL motion was scheduled for May 21 argument. Defendants promptly advised the district court of that MDL motion hearing date and of their understanding that the historical practice of the MDL Panel was that — because the Panel is comprised of judges from across the nation — motions are decided immediately after oral argument, the decision is known within the federal judiciary almost immediately, and the opinion of the Panel issues to the public within about two or three weeks thereafter. (Pan. RE14:243; Pan. R6:1175-79). Thus, any grant of stay — or simple withholding of opinion by the district court — pending the MDL Panel ruling would be of exceedingly short duration.

The MDL motion was indeed heard by the MDL Panel on May 21. Less than three weeks later, on June 10, the MDL Panel did then publicly issue its decision *granting* defendants' motion and selecting the District of Columbia as the MDL forum. In particular, the MDL Panel held that con-

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* In addition to these grants of stay prior to the MDL consolidation having been granted, numerous district court judges have since formally or informally granted stays in 26 out of 27 of these foreign-government tobacco cases for the brief period necessary for final transfer by the MDL Panel to take place notwithstanding the pendency of a remand motion. *See, e.g.*, Order Granting Defendants' Motion for Stay and Staying Plaintiff's Motion to Remand in *State of Goias* v. *Philip Morris*, No. 99-3061 (S.D. Fla. Dec. 10, 1999). In the single such case where such stay was denied, upon appeal by defendants from that denial (and a resulting remand order), the Fifth Circuit concluded that it was without appellate jurisdiction to resolve the issue. *See Rio de Janeiro* v. *Philip Morris*, 239 F.3d 714 (5th Cir. 2001).

solidation was necessary in order to "prevent inconsistent pretrial rulings" in these cases — a matter the Panel found to be of "heightened importance, from the standpoint of the United States' conduct of foreign relations, in litigations involving foreign sovereign governments as plaintiffs." (Pan. RE17:276 (emphasis added)).

Nevertheless — *after* oral argument of the MDL motion (on May 21) but *before* public issuance of the MDL decision (on June 10) — the district court on May 28, 1999 issued an order denying a stay in the *Panama* case and granting remand. In its opinion, the district court set forth the view that there "[was] a likelihood" that the MDL motion would be denied — a less-than-clairvoyant prediction which was then publicly refuted less than two weeks later. (Pan. RE5:26).*

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* Contrary to Petitioner's suggestion that transferor courts somehow typically decide remand motions rather than stay their actions for the brief period necessary for final MDL transfer to take place (Pet. 4), the precise *opposite* is in fact the case. Indeed, the MDL Panel made this very point upon oral argument in *these very cases*: "transferor judges, for whatever reason and for good reasons, for crying out loud, don't act on these motions to remand very often ... they *almost always stay* their actions until the Panel acts .... They don't have to do it that way, but that is the way they do it." (Pan. RE15:271 (emphasis added)). Petitioners' assertion that the MDL Panel somehow instead had stated "that district courts should act on pending motions [to remand]" (Pet. 4) is flatly belied by the record. (Pan. RE15:271).

Indeed, as noted above, numerous district courts have now — formally or informally — stayed *26* of these very foreign-government cases for the brief period necessary for transfer to become final, notwithstanding the pendency of a remand motion. *See* p. 10 n.*, *supra*. And these numerous stays are fully consistent with the logical and widely prevailing practice. *See, e.g.*, *Medical Soc'y of the State of New York* v. *Connecticut Gen. Corp.*, 2001 WL 1328366, at *2-*3 (S.D.N.Y. Oct. 26, 2001) ("preferable practice" is to allow "the transferee court to resolve the jurisdictional question"; "there are significant economies in having a single court decide a jurisdictional question which has arisen and presumably will continue to arise in cases around the nation") (citing *Ivy* v. *Diamond Shamrock Chems. Co.*, 901 F.2d 7 (2d Cir. 1990)); *Johnson* v. *AMR Corp.*, 1996 WL 164415, at *4 (N.D. Ill. Apr. 3, 1996) ("Since the MDL

4. Defendants' appeal to the Fifth Circuit

Defendants appealed from the district court's orders denying recusal, denying a stay pending MDL transfer, and granting remand. On July 17, 2000, after briefing and oral argument, the United States Court of Appeals for the Fifth Circuit unanimously reversed the district court's denial of recusal — and consequently vacated the subsequent remand order. *Republic of Panama* v. *American Tobacco*, 217 F.3d 343 (5th Cir. 2000) (Pet. App. 29a-39a).*

The Fifth Circuit began its analysis by expressly noting:

> The review of a recusal order under § 455(a) is "extremely fact intensive and fact bound," thus a close recitation of the factual basis for the appellants' recusal motion is necessary .... The analysis of a § 455(a) claim must be guided, not by comparison to similar situations addressed by prior jurisprudence, but rather by an independent examination of the facts and circumstances of the particular claim.

Pet. App. 34a. The Fifth Circuit then analyzed the specific factual basis for recusal here, and determined based upon those specific facts that recusal was required. Pet. App. 34a-36a.

Notably, Panama (represented by the same counsel that represents Sao Paulo here) did *not* file any petition for rehearing (either by the panel or *en banc*). Nor did it file a petition for writ of certiorari. Accordingly, on August 8, 2000,

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will soon be looking at the forest as well as the trees, the best course is to postpone ruling on the present [remand] motion.").

* *See also, e.g.*, *Tramonte* v. *Chrysler Corp.*, 136 F.3d 1025, 1028 (5th Cir. 1998) (remand order vacated because district judge should have previously granted disqualification).

the Fifth Circuit's mandate in *Panama* issued, and the *Panama* case was reassigned to a different district judge in the Eastern District of Louisiana (Clement, J.).* Despite plaintiff's urging that the newly-assigned judge follow Judge Barbier's rulings and enter an immediate remand order, Judge Clement refrained from taking any such action; the case was then transferred by the MDL Panel to the District of Columbia for consolidated pretrial proceedings with all the other foreign-government cases already there pending. (The proceedings that have since taken place in the MDL are described below at pp. 15-17, *infra*.)

B. *Sao Paulo*

The *Sao Paulo* case was filed on February 9, 2000 (about a year and a half after *Panama*) by the same plaintiff's counsel in the same Louisiana state court. It has followed essentially the same procedural course — except that by the time *Sao Paulo* was brought, MDL treatment of these foreign-government cases had long previously been granted, the cases were being actively presided over by Judge Friedman in the District of Columbia, and Judge Barbier's refusal to stay and grant of remand came *after* a conditional transfer order transferring *Sao Paulo* itself to the District of Columbia as a "tag-along" action had already been issued by the MDL Panel.

Thus, in March 2000 — four months before the Fifth Circuit issued its decision in *Panama* — defendants removed *Sao Paulo* to the Eastern District of Louisiana, where the case was assigned to Judge Barbier as "related" to *Panama*. Defendants informed the MDL Panel of the pendency of the *Sao Paulo* case; the MDL Panel (in accordance with its rules) on April 7, 2000 proceeded to issue a conditional

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* Judge Clement has since been appointed to the United States Court of Appeals for the Fifth Circuit.

transfer order that, upon becoming final, would have transferred the *Sao Paulo* case to the MDL Proceeding in the District of Columbia with the others. *See Sao Paulo* order, MDL No. 1279 (J.P.M.L. April 7, 2000).

As in *Panama*, defendants filed a motion for recusal with the district court (predicated on the same grounds as in *Panama*) and a motion to stay for the brief period necessary for MDL transfer to become final. But once again — *before* final transfer of the *Sao Paulo* case to the District of Columbia could take place and, this time, long after the MDL Panel had ruled that these foreign-government cases *should* be consolidated for pretrial purposes in the District of Columbia — Judge Barbier proceeded to reach out to deny a stay and grant the *Sao Paulo* remand motion. Pet. App. 40a-47a.

On May 30, 2000, defendants filed a notice of appeal in *Sao Paulo*. Shortly thereafter, the Fifth Circuit proceeded to issue its unanimous decision in *Panama* reversing the denial of recusal. Given the squarely-on-point *Panama* precedent, proceedings on defendants' appeal in *Sao Paulo* were then summary in nature. Indeed, Sao Paulo, as appellee, submitted a four-page appellee's brief that expressly *conceded*: "appellee agrees that this court is bound by its prior decision in *Panama*, which will result in a reversal of the district court's denial of the motion to recuse and vacating of the order of remand without addressing the merits of said order." *Sao Paulo* 5th Cir. Br. at 3. Sao Paulo's brief further explicitly "pray[ed] that th[e] court enter an order in accordance with its prior decision in the *Panama* case." *Id.* at 4.

In light of Sao Paulo's explicit concessions in its appellee's brief that reversal was required, defendants submitted no reply brief, and the Fifth Circuit considered the *Sao Paulo* appeal without oral argument. On May 14, 2001, the Fifth Circuit issued its decision in *Sao Paulo* v. *American Tobacco*, 250 F.3d 315 (5th Cir. 2001) (Pet. App. 17a-28a).

Two of the Judges on the *Sao Paulo* panel (E. Garza and Stewart, JJ.) — both of whom had already participated as members of the *Panama* panel — joined in a two-paragraph *per curiam* order directing reversal based on the court's prior decision in *Panama*. Pet. App. 18a-19a. The third judge on the *Sao Paulo* panel (Parker, J.) issued a concurring opinion agreeing that *Panama* was binding on the panel, but arguing that the *Panama* case had been wrongly decided. Pet. App. 20a-25a. Sao Paulo then filed a motion for rehearing *en banc*, which was denied (with Judge Parker and five other judges dissenting). Pet. App. 2a-16a.

Upon the denial of rehearing, the Fifth Circuit proceeded to issue its mandate in *Sao Paulo*. As with *Panama*, the case was then reassigned within the Eastern District of Louisiana and then transferred by the MDL Panel to the District of Columbia for consolidated pretrial proceedings with the other foreign-government tobacco cases.

C. Proceedings in the District of Columbia

The *Panama* and *Sao Paulo* cases are thus now both pending in the District of Columbia District Court, along with numerous other such foreign-government cases (including eight brought by Sao Paulo's sister-states of Brazil).

All of these cases that were originally filed in *federal* courts have proceeded to final judgment of dismissal with prejudice. Thus, on May 22, 2001, the D.C. Circuit issued a decision unanimously affirming dismissal of the federally-filed foreign-government cases holding that "the nations' claims are 'too remote, contingent, derivative and indirect to survive.'" *Republic of Guatemala* v. *Tobacco Institute*, 249 F.3d 1068, 1076 (D.C. Cir. 2001).* Just three months ago,

* In so holding, the D.C. Circuit followed the decisions of all seven other courts of appeals which have likewise so ruled, each unanimously,

on October 29, 2001, this Court denied a petition for certiorari filed by three foreign governments with respect to that decision. *See* 122 S. Ct. 463 (2001).

As for those foreign-government cases that were filed instead in *state* courts and removed by defendants — including *Panama* and *Sao Paulo* — the D.C. Circuit presently has before it *sub judice* consolidated proceedings which squarely present the issue whether federal question jurisdiction exists over such foreign government actions or whether they should be remanded back to state courts. *See Republic of Venezuela, et al.* v. *Philip Morris*, Nos. 00-7213 through 00-7216, 00-7257, 00-7258 (D.C. Cir.).* Those proceedings have already been argued before the D.C. Circuit and a decision is expected shortly. In the interim, the D.C. District Court has

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in cases brought by other third-party health care payors and providers ranging from union funds to hospitals to Blue Cross insurers — and this Court has denied certiorari in all such cases in which it has been sought. *See Steamfitters* v. *Philip Morris*, 171 F.3d 912 (3d Cir.), *reh'g en banc denied* (Apr. 29, 1999), *cert. denied*, 528 U.S. 1105 (2000); *Oregon Laborers* v. *Philip Morris*, 185 F.3d 957 (9th Cir. 1999), *cert. denied*, 528 U.S. 1075 (2000); *Laborers Local* v. *Philip Morris*, 191 F.3d 229 (2d Cir.), *reh'g en banc denied* (Aug. 6, 1999), *cert. denied*, 528 U.S. 1080 (2000); *Teamsters* v. *Philip Morris*, 196 F.3d 818 (7th Cir.), *reh'g en banc denied* (Dec. 16, 1999); *Texas Carpenters* v. *Philip Morris*, 199 F.3d 788 (5th Cir. 2000); *Health Care Serv.* v. *Brown & Williamson*, 208 F.3d 579 (7th Cir. 2000); *UFCW* v. *Philip Morris*, 223 F.3d 1271 (11th Cir. 2000); *Lyons* v. *Philip Morris*, 225 F.3d 909 (8th Cir. 2000); *Allegheny Gen. Hosp.* v. *Philip Morris*, 228 F.3d 429 (3d Cir. 2000); *Association of Washington Pub. Hosp. Dists.* v. *Philip Morris*, 241 F.3d 696 (9th Cir.), *reh'g en banc denied* (Apr. 16), *cert. denied*, 122 S. Ct. 207 (2001); *Regence BlueShield* v. *Philip Morris*, 2001 WL 205996 (9th Cir. Feb. 28, 2001) (unpublished disposition).

* The district judge presiding over the MDL had concluded that federal jurisdiction was lacking over four such cases. *See In re Tobacco (Venezuela)*, 100 F. Supp. 2d 31 (D.D.C. 2000). Thereafter, the D.C. Circuit accepted for briefing and oral argument petitions for advisory and supervisory mandamus directed at the identical federal-question jurisdictional issue presented by the remaining cases pending in the D.C. District Court — including *Panama* and *Sao Paulo*. Argument before the D.C. Circuit took place on October 16, 2001.

stayed the remaining actions — including *Sao Paulo* and *Panama* — pending the resolution of that jurisdictional question by the D.C. Circuit.

REASONS FOR DENYING THE WRIT

The petition should be denied for several reasons. *First*, the outcome of the now-pending proceedings before the D.C. Circuit regarding remand will either cause the petition to become moot and/or place this case in a procedural posture rendering it an inappropriate vehicle for review of any question Petitioner claims it presents. *See* pp. 17-19, *infra*. *Second*, this case does not present the question that Petitioner contends it presents; rather, as the Fifth Circuit expressly observed in *Panama*, the decision below was based upon an "extremely fact intensive and fact bound ... examination of the facts and circumstances of the particular claim" for recusal here. And that fact-bound decision of the court below was correct. *See* pp. 19-26, *infra*. *Finally*, the decision below does not conflict with any decision of this Court or any other court of appeals. *See* pp. 27-30, *infra*.

I. THE INSTANT PETITION WILL EITHER SHORTLY BECOME MOOT AND/OR THE PROCEDURAL POSTURE OF THE ACTION WILL RENDER CERTIORARI INAPPROPRIATE.

As noted above, the *Sao Paulo* case (as well as *Panama*) is now pending before the District of Columbia District Court (together with over two dozen substantially identical cases). All of these cases have been stayed by the district court pending decision by the D.C. Circuit of proceedings already argued before it that present the issue whether federal question jurisdiction is present in such cases.

Regardless of which way the D.C. Circuit decides that issue, it is respectfully submitted that the decision of the D.C. Circuit will either moot Sao Paulo's petition and/or render it

an inappropriate vehicle for review of any issue that Petitioner claims it presents. Thus:

(1) If the D.C. Circuit rules that federal jurisdiction over these cases is lacking, then it could certainly be expected that the D.C. District Court would proceed to remand the *Sao Paulo* case to the Louisiana state court in which it was filed — *i.e.*, the precise result that Sao Paulo hopes to achieve through its petition. Accordingly, Sao Paulo's petition would then be moot.

(2) Conversely, should the D.C. Circuit rule that federal question jurisdiction properly *does* exist over these cases, then the district court plainly will not remand. Instead, it will follow its own prior merits decision — which was affirmed by the D.C. Circuit in *Republic of Guatemala* v. *Tobacco Institute*, 249 F.3d 1068 (D.C. Cir.), *cert. denied*, 122 S. Ct. 463 (2001) — and will grant *dismissal* of the *Sao Paulo* case, along with the over two-dozen other remaining foreign-government cases, based on that binding precedent.

In that eventuality, putting aside the issue whether the petition might likewise become moot, it would at the very least make little sense for this Court to seek to upset such a final judgment in *Sao Paulo* (alone among the many substantially identical cases) to send that single case back to a Louisiana state court, when: (i) the basis of the Eastern District of Louisiana's remand order would — by definition — then be in direct conflict with the decision of the D.C. Circuit on the federal jurisdictional question; (ii) quite apart from any issue of judicial disqualification, it was a patent abuse of discretion for Judge Barbier in the first place to have declined a stay in *Sao Paulo* for the brief period necessary for the order directing MDL transfer of the case to have become final; and (iii) the District of Columbia

Court will then have issued a final judgment on the merits in *Sao Paulo* — a case as to which the D.C. Circuit will then have ruled that there *is* proper federal question jurisdiction — and the arguments raised by the petition have nothing to do either with the basis of that merits determination or the D.C. Circuit's federal jurisdictional determination.

Accordingly, given that — as a result of the proceedings before the D.C. Circuit — the *Sao Paulo* petition will either become moot and/or the case will be placed very much in a procedural posture rendering it inappropriate for certiorari review, the petition should be denied.

II. THE DECISION BELOW WAS A FACT-BOUND DETERMINATION AND DOES NOT PRESENT THE QUESTION THAT PETITIONER CONTENDS IT PRESENTS.

In addition to the mootness/procedural posture reasons set forth above for denial of the writ, there are multiple other reasons why the petition should be denied. Most fundamentally, this case simply does not present the question that Petitioner contends it presents.

Petitioner repeatedly mischaracterizes the decision of the Fifth Circuit below as having "adopted a new legal standard for recusal" in which a district judge is required to recuse "whenever he is mistakenly believed to have a pre-judicial association with a particular legal position relevant to the case or a party's lawyer." Pet. 1 & i (Question Presented); *see also*, *e.g.*, Pet. 4 ("Respondent's argument [is] that disqualification is required in any case of pre-judicial association with a particular legal position."); Pet. 9 (the court below "adopt[ed] the principle of 'issue recusal'"); Pet. 24 ("To hold that disqualification was required in this case, the Fifth Circuit adopted the principle of 'issue recusal'").

Then — predicated entirely upon this mischaracterization of the decision below — the petition launches into a series of dire predictions about how the decision below will supposedly spawn a "cottage industry" of recusal motions; "a new, broad avenue" for litigants to avoid judges negatively inclined toward their cases; and so on. *E.g.*, Pet. 1, 8, 9, 13.

Petitioner's arguments are based upon a misreading of the *Panama* decision below (then followed in *Sao Paulo*). This is not remotely a case — such as Petitioner contends — where recusal was directed on some general "principle of 'issue recusal.'" *E.g.*, Pet. 9. Far from presenting a case adopting some "new legal standard," the decision was expressly based on the court's evaluation of the "'extremely fact intensive and fact bound' ... basis for the appellants' recusal motion," and an "examination of the facts and circumstances of the particular claim" for recusal presented in this case. Pet. App. 34a. These facts included (as discussed more fully at pp. 3-8, *supra*):

- The Louisiana Trial Lawyers Association as amicus in *Gilboy*:

    1. argued adverse to four defendants in that case who were also named as defendants in the instant case;

    2. took positions on core factual and legal issues which are also core factual and legal issues in the instant case; and

    3. condemned these very same defendants — and the specific conduct at issue in both the prior and current litigation — in the harshest possible terms. Indeed, the Association adjudged the *Gilboy* defendants as culpable — *factually, legally, and morally* — for addicting and killing members of the public en masse. *See* pp. 6-7, *supra*.

- The following objective facts concerning Judge Barbier's leadership roles in the Louisiana Trial Lawyers Association, and his connections to *Gilboy*:

    1. Judge Barbier had served as President of the Association until several months before the *Gilboy* brief was filed;

    2. Judge Barbier continued to serve in key leadership positions — as Past President and as a member of the Association's Executive Committee — when the *Gilboy* brief was prepared and filed;

    3. Judge Barbier and his law firm were listed as counsel to the Association (together with present counsel for Panama and Sao Paulo here, Michael X. St. Martin) on a motion to submit the amicus brief in *Gilboy*; and

    4. the published decision of the Louisiana Supreme Court in *Gilboy* lists Carl Joseph Barbier (and present counsel for Panama and Sao Paulo, Mr. St. Martin) as counsel of record to the Association.

Contrary to Petitioner's assertions that the decision below adopted some "new legal standard" of "issue recusal," the decision below turned on a case-specific analysis of the above facts, and there is no reason for this Court to review that fact-bound decision. In an effort to obscure these objective facts upon which the decision below was based, the petition relegates many of them to a footnote and then asserts in conclusory fashion that the Fifth Circuit supposedly "did not accept ... [these] factors" as "bolster[ing] the basis for requiring disqualification." Pet. 7 n.1. But there is nothing in the Fifth Circuit's opinion (either in this case or in *Panama*) to suggest that the court was somehow eschewing reliance on any one or more of the above-stated objective facts. Indeed,

precisely to the contrary, the court's decision in *Panama* (which in turn was the basis for the two-paragraph per curiam order in *Sao Paulo* challenged here) summarized the factual grounds underlying its decision as follows:

> Panama alleges that the defendant tobacco companies conspired to conceal the addictiveness and health risks of tobacco. Panama seeks damages for past and future health costs for diseases caused by smoking ....
>
> Prior to his appointment to the district court, Judge Barbier was president of the Louisiana Trial Lawyer's Association ("LTLA") from approximately October 1989-October 1990. In April 1991, LTLA submitted an amicus brief on behalf of the plaintiffs in a product liability suit against tobacco companies. The LTLA amicus brief alleged that smoking was addictive and caused cancer. The LTLA amicus brief also stated that the tobacco companies have known the dangers of smoking for decades. Judge Barbier's name was listed on the brief as president of LTLA. In February 1999, Judge Barbier denied the motion to recuse, stating that he had not participated in the actual writing of the brief and that his term as president had ended when the brief was filed.
>
> * * *
>
> In April 1991, LTLA filed an amicus brief in a product liability case against tobacco companies in Louisiana state court. Judge Barbier's name is listed on the "Motion for Leave to File Amicus Curiae Brief", which was filed with the amicus brief. Judge Barbier is listed on this filing as President of the LTLA. Also listed as counsel for this motion is Michael St. Martin, who is counsel for Panama in the present action. The amicus brief itself which was attached to the motion was signed by another attorney and does not list Judge Barbier as counsel. While arguably the facts of the Louisiana product liability suit and the present suit may be distinguishable, the amicus brief contained general statements about tobacco companies. These statements included that tobacco use is addictive. The amicus brief also stated that the defendant tobacco companies should be held liable because they were negligent in producing a product that was more dangerous than it was intended to be, and that the companies knew or should have known of the addictive nature of their cigarettes. In the present case, Panama similarly asserts that as a result of defective and dangerous design, testing, manufacturing, marketing and practices, the product produced by the defendants is defective and unreasonably dangerous.

Pet. App. 30a-31a, 34a-35a. In short, Petitioner's assertion that the decision below somehow adopted some aberrant principle of "issue recusal" simply fails to come to grips with the case-specific factual basis upon which the decision below was explicitly based.

Equally unfounded are Petitioner's dire predictions that the decision below will somehow spawn a "cottage industry" of recusal motions; a "new, broad avenue" for litigants; and the like. Indeed, in the almost *19 months* since the Fifth Circuit's decision in *Panama* was issued, that case has been cited only *once* by any court. And that one citation was merely part of a string-cite in footnote 45 of a district court opinion that *denied* recusal, but went on to canvass different "examples of cases in which courts have required recusal." *In re Initial Public Offering Sec. Litig.*, 174 F. Supp. 2d 70, 98 n.45 (S.D.N.Y. 2001). Notably, *Panama* there was correctly distinguished on its facts as follows: "recusal required where judge had been president of organization that filed amicus brief with similar allegations in case against defendants in state court and whose name was on filings in that

case." *Id.* And the decision of the Fifth Circuit in *Sao Paulo* — which ostensibly is the subject of the instant petition, and which consists of but a two-paragraph *per curiam* order — has never been cited at all.*

Moreover, not only was the Fifth Circuit's *actual* decision — rather than the mischaracterization of it portrayed in the petition — a fact-bound determination unworthy of this Court's attention, the decision below was clearly correct. Title 28 U.S.C. § 455(a) provides that "[a]ny ... judge ... shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." It is well settled that recusal is required where an "objective observer" would reasonably question a judge's impartiality. *See, e.g., Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847, 860-61 (1988); *Liteky* v. *United States*, 510 U.S. 540, 548 (1994) ("what matters is not the reality of bias or prejudice but its appearance. Quite simply and quite universally, recusal was required whenever 'impartiality might reasonably be questioned'") (quoting 28 U.S.C. § 455(a)).

Applying well-settled law to the objective facts, the Fifth Circuit correctly concluded that recusal was required here *notwithstanding* Judge Barbier's recollections that while he "was vaguely aware of th[e] [Gilboy] case" and "can't explain actually how or why [his] name is listed on there," "[t]he procedure at that time was that the Amicus Committee and the members of the Amicus Committee alone decided whether and when to file amicus briefs. It was not something that was passed by the Board of Governors or Executive Committee or whatever." (Pan. RE6:46; Pan. RE7:91-92). A reasonable observer here would at the very least reasonably

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* Moreover, the fact that six Fifth Circuit judges dissented from the denial of rehearing *en banc* in this case speaks loud and clear that the decision below is *not* going to lead to some broad new highway for the grant of disqualification motions in that Circuit.

question whether an attorney who had so recently completed his term as the Association's President, who continued to serve the Association as Past President and Executive Committee member, and who was listed as "President" of the Association on the motion to file the *Gilboy* brief and also as counsel of record for the Association in the Louisiana Supreme Court's published *Gilboy* opinion itself, had no involvement in such a high-profile and controversial matter. *See also, e.g., Hall* v. *Small Bus. Admin.*, 695 F.2d 175, 179 (5th Cir. 1983) ("[K]nowledge of all the facts implies only knowledge of those that are objectively ascertainable. The term cannot ... extend to what happens in the judge's chambers or to his actual virtue because, were that so, the test would be not the appearance of impartiality but the absence of actual prejudice.") (case cited by *Liljeberg*, 486 U.S. at 860); *In re School Asbestos Litig.*, 977 F.2d 764, 782-84 (3d Cir. 1992).

And even if a reasonable observer would accept without question that Judge Barbier was *not* involved in the preparation or approval of the *Gilboy* brief, a reasonable observer would nonetheless expect that Judge Barbier *shared the views* expressed by the Association in *Gilboy*. Judge Barbier was no mere member of the Association, indeed no mere member of the administration of the Association — he was the immediate Past President and a member of the Association's key governing body, the Executive Committee. Moreover, Judge Barbier was not an "attorney-for-hire" retained to represent a client — such that arguments expressed on behalf of the client should not be equated with the personal views of the advocate. *Cf.* Model Rules of Prof'l Conduct R. 1.2. Rather, here we are dealing with persons volunteering an *amicus* brief precisely to set forth views that they *do* strongly hold. A reasonable observer would expect that — and at minimum reasonably question whether — an attorney who chose to devote great time and energy, without fee, to a group such as LTLA, serving first as its President

and later as its Past President and a member of its Executive Committee, would share the key views and positions espoused by the Association as part of its advocacy efforts in that important case. *Indeed, at no time has Judge Barbier ever stated that he did not share those views.*

Moreover, what puts this case on a different plane entirely is that the Association in *Gilboy* did far more than express a general policy or even a general legal position in an unrelated case. Rather, as noted, the Association brief harshly condemned many of the *same defendants* who are the defendants in this case, based upon allegations of the *very conduct* equally claimed to be wrongful in that case and this one. (And the attorney listed as *co-counsel* with Judge Barbier in that prior proceeding is the very same attorney who then appeared as counsel for plaintiffs Panama and Sao Paulo *before* Judge Barbier in this very litigation.) Under these unusual circumstances, a reasonable observer would certainly question whether Judge Barbier might be less than impartial. To the man in the street, the tobacco-company defendants here faced a stacked deck.*

* And that perception is by no means diminished by the facts that: (1) notwithstanding Judge Barbier's denials of stay in *Panama* and *Sao Paulo*, numerous district court judges both before and after MDL consolidation was directed in these cases have formally or informally granted such stays in *26* substantially identical foreign government cases notwithstanding the pendency of substantially identical remand motions — indeed *all but one* of the other judges presented with the question has done so; and (2) upon the reassignment of these very *Panama* and *Sao Paulo* cases after the Fifth Circuit's decisions, the new judge assigned to these matters (Clement, J.) did not act as Judge Barbier had done and *declined* plaintiff's urging that the court rule on the remand motions prior to finalization of MDL transfer to the District of Columbia.

III. PETITIONER HAS FAILED TO SHOW THAT THE COURT OF APPEALS RENDERED A DECISION IN CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER COURT OF APPEALS.

A. No conflict with any decision of this Court

The Fifth Circuit's decision does not conflict in any way with any decision of this Court.

Petitioner's argument that the decision conflicts with *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988) is patently without merit. Indeed, far from *conflicting* with this Court's decision in *Liljeberg*, the decision below is very much *supported* by that decision. In *Liljeberg*, this Court held that a judge was required to recuse under § 455(a) where he had an interest in the litigation notwithstanding that he was entirely unaware of that interest. *See id.* at 861. This Court ruled that "[u]nder section 455(a), therefore, recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would *expect* that the judge would have actual knowledge." *Id.* at 860-61 (quoting 796 F.2d 769, 802 (5th Cir. 1986)) (emphasis added). Thus, *Liljeberg* makes clear that the expectations of a reasonable observer control — even where inconsistent with the trial court's *own professed knowledge or recollection*. *See id.* (citing inter alia, *Hall* v. *Small Bus. Admin.*, 695 F.2d 175, 179 (5th Cir. 1983)).

Also meritless are Petitioner's claims (again purportedly based on *Liljeberg*) that the district court's denial of recusal supposedly constituted "harmless error." *First*, it should be noted that no claim of "harmless error" was made below either in this case or in *Panama*, nor was any such contention even raised in Petitioner's petition for rehearing. As such, the

argument is plainly waived. *See, e.g.*, *TRW Inc.* v. *Andrews*, 122 S. Ct. 441, 451 (2001). *Second*, it is in any event clear that the district court's denial of recusal here was anything but harmless: as noted, following that denial, the district court proceeded on the highly-unusual course of denying a stay pending MDL transfer and directing remand — even though MDL treatment of these foreign-government cases had long since been directed by the MDL Panel and a conditional order of transfer in the *Sao Paulo* case itself had already been issued by the MDL Panel. Notably, the district judge in the Eastern District of Louisiana to whom the *Panama* and *Sao Paulo* cases came to be reassigned following the Fifth Circuit's decisions *declined* to follow that same course — as have numerous other district judges presiding over *26* other substantially identical foreign-government actions that were likewise the subject of similar remand motions. And moreover, as noted above, the D.C. Circuit has now already upheld dismissal of all the federally-filed such foreign government actions (with certiorari having already been denied by this Court from that decision). In these circumstances, the notion that Judge Barbier's denial of recusal here was somehow "harmless" is spurious.

Equally without merit is Petitioner's contention that the decision below somehow conflicts with *Liteky* v. *United States*, 510 U.S. 540 (1994). There, this Court held that where a claim of appearance of bias stems from within the judicial proceedings themselves, recusal is required only in exceptional circumstances involving a "deep-seated and unequivocal antagonism that would render fair judgment impossible." *Id.* at 556. But in the case at bar, the appearance of bias as to Judge Barbier did not stem from any experience with defendants in the case before him; rather it was clearly from an "extrajudicial source" that does readily fall within § 455(a). And likewise off-point is Petitioner's attempt to rely on this Court's reasoning in *Liteky* that "when one of those aspects addressed in [§ 455](b) is at issue, it is poor

statutory construction to interpret [§ 455](a) as nullifying the limitations (b) provides, except to the extent the text requires." *Id.* at 552 n.2. Obviously, as discussed above, the grounds for recusal here go far beyond any "specific aspect" addressed by § 455(b).*

B. No conflict with any decision of any other court of appeals

Petitioner's claims of conflict with decisions of other courts of appeals are similarly predicated upon Petitioner's mischaracterization of the decision below and the grounds for recusal relied upon therein. Petitioner's own discussion amply demonstrates that those other decisions are plainly distinguishable on their facts. A few additional points may be made:

- Notwithstanding Petitioner's suggestion to the contrary, the decision below *was* based on "all the *actual facts* as they appear on the record." Pet. 19 (emphasis in original). Petitioner's suggestion that the Fifth Circuit instead somehow had a "singular focus on the Respondents' allegations of partiality" while failing also to consider the various facts relied upon by Petitioner (*E.g.*, Pet. 23) is totally without basis and finds no support in the record or the decision below.

- As discussed above, the Fifth Circuit's decision did not adopt a principle of "issue recusal." As such, Petitioner's argument (Pet. 24-28) that other courts of appeals do not follow that principle is irrelevant.

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* Moreover, it should be noted that those arguments, too, were never raised below, and were therefore waived. *See* pp. 27-28, *supra*.

- Petitioner attempts to seize upon one part of a sentence from the *Panama* opinion — in which the Fifth Circuit stated that "a reasonable person *might* harbor doubts about the trial judge's impartiality" — to claim that the Fifth Circuit supposedly applied a "standard" in conflict with decisions of other circuits, which require that a reasonable person "*would* harbor doubts about the judge's impartiality." (Pet. 28) (emphasis added). Putting aside that elsewhere in the same *Panama* opinion the Fifth Circuit stated that the applicable standard was "whether a well-informed, thoughtful and objective observer *would* question the court's impartiality" (Pet. App. 34a (emphasis added)) — and the fact that the word "might" is the very word that appears on the face of § 455(a) itself ("any proceeding in which his impartiality *might* reasonably be questioned") (emphasis added) — it is clear in any event that there is no substantive difference in the standard applied by the Fifth Circuit and the other decisions cited by plaintiff.*

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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* Moreover, Petitioner's suggestion that the court below somehow did not apply an "abuse of discretion" standard (Pet. 29-30) is once again belied by the *Panama* opinion itself. *See* Pet. App. 34a ("Denial of recusal is reviewed for abuse of discretion.").

January 31, 2002

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APPENDIX

APPENDIX

MOTION FOR LEAVE OF COURT TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF FILED ON BEHALF OF THE LOUISIANA TRIAL LAWYERS ASSOCIATION (LTLA) IN *GILBOY* v. *THE AMERICAN TOBACCO CO.*

SUPREME COURT OF LOUISIANA

DOCKET NUMBER 90 C 2686

****

ROBERT C. GILBOY

VERSUS

THE AMERICAN TOBACCO COMPANY, ET AL.

****

MOTION OF THE LOUISIANA TRIAL LAWYERS ASSOCIATION FOR LEAVE OF COURT TO FILE AMICUS CURIAE BRIEF

NOW INTO COURT comes Lawrence S. Kullman, Chairman of the Amicus Curiae Committee of the Louisiana Trial Lawyers Association, who respectfully requests leave of court on behalf of the Louisiana Trial Lawyers Association to file an amicus curiae brief in the above captioned matter. The legal issue presented is one which significantly impacts the rights of victims of product caused injuries and is an important matter of Louisiana law. As such, the undersigned respectfully requests that this Court grant the Louisiana Trial Lawyers Association leave to file an amicus curiae brief.

Respectfully Submitted,

/s/ Lawrence S. Kullman

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SUPREME COURT OF LOUISIANA

DOCKET NUMBER 90 C 2686

****

ROBERT C. GILBOY

VERSUS

THE AMERICAN TOBACCO COMPANY, ET AL.

****

ORDER

Considering the foregoing,

IT IS ORDERED that the Amicus Curiae Committee of the Louisiana Trial Lawyers Association is granted leave to file an amicus curiae brief in this matter.

New Orleans, Louisiana, this 1st day of May, 1991.

/s/ [Illegible]

[Certificate of Service Omitted]

SUPREME COURT OF LOUISIANA

DOCKET NUMBER 90 C 2686

****

ROBERT C. GILBOY

VERSUS

THE AMERICAN TOBACCO COMPANY, ET AL.

****

ON WRIT TO THE FIRST CIRCUIT COURT OF APPEAL
NUMBER CA90 0696, NINETEENTH JUDICIAL
DISTRICT COURT, PARISH OF EAST BATON ROUGE,
HON. WILLIAM E. BROWN, JUDGE PRESIDING,
NUMBER 314,002

AMICUS CURIAE BRIEF FILED ON BEHALF OF THE LOUISIANA TRIAL LAWYERS ASSOCIATION

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On behalf of The Louisiana
Trial Lawyers Association

[Table of Contents and Table of Authorities Omitted]

MAY IT PLEASE THE COURT:

PREFACE

Scientific Literature — Early 1900s

> "Since the early 1900s scientific literature and historical anecdotes have provided evidence that tobacco use is a form of drug addiction." *The Health Consequences of Smoking: Nicotine Addiction*, A Report of the Surgeon General, 1988. overview, p. 6.
>
> "As early as the 1920s and 1930s, some investigators were concluding that nicotine was responsible for the *compulsive* use of tobacco products..." *Id.*, p. 10.

Cigarette Advertisement — 1954

> "Distinguished authorities point out ... [t]hat there is no proof that cigarette smoking is one of the causes [of lung cancer]." Advertisement of the Tobacco Industry Research Committee, Baton Rouge Morning Advocate, January 4, 1954, Supp. Record, p. 20.
>
> "We believe that the products we make are not injurious to health." *Id.*

Current Addiction Report

> "[D]ifficulty in quitting ... is in large part due to the addicting properties of nicotine ..." Otis R. Bowen, M.D., Secretary, U.S. Dept. of Health and Human Services. Transmittal letter to George Bush, President, Surgeon General's Report.
>
> "This Report shows conclusively that cigarettes and other forms of tobacco are addicting in the same sense

as are drugs such as heroin and cocaine." C. Everett Koop, M.D., Sc.D., Surgeon General. *Id.*, p. vi.

"Cigarettes and other forms of tobacco are addicting. Patterns of tobacco use are regular and compulsive, and a withdrawal syndrome usually accompanies tobacco abstinence." Conclusion from Chapter IV: Tobacco Use Compared to Other Drug Dependencies. *Id.*, p. 215.

Plaintiff's Testimony

"I didn't know how difficult it would be [to quit smoking]." Transcript of video-deposition, cross-examination, p. 18.

"I could have given up heroin more quickly than I could cigarettes." Gilboy Depo., p. 34, Supp. Record, p. 14.

"I went eight days [with no smoking] and I was climbing walls that were nonexistent. . ." Transcript of Gilboy Video deposition, cross-examination, p. 136.

Stockholders' Meeting

"Philip Morris said that countries that do not require warning labels account for about 11 percent of total cigarette sales. Placing warning labels on cigarettes in countries where they are not required *is not useful*, the company said." (Emphasis added.) "Philip Morris shareholders vote against warning proposals," New Orleans Times-Picayune, April 26, 1991, Ex. 3.

INTEREST OF THE LOUISIANA TRIAL LAWYERS ASSOCIATION

The Louisiana Trial Lawyers Association files this brief, amicus curiae, not on behalf of any party, but on behalf of principles of law. In our view, cigarette manufacturers, but not members of the public, knew from the early 1900s that cigarettes were addictive. The manufacturers knew that once purchasers began to smoke — usually in their teens or earlier — it was very difficult, if not impossible, for those smokers to stop. Manufacturers should not be able to argue that the smokers whom they addicted are *totally* barred from recovering for their cancers because those same smokers failed to stop smoking. Their failure was, at least in part, due to the very addiction that was caused by the defendants. Those defendants should not be able to benefit from the addiction that they caused. As one professor has stated, "[t]he plaintiff's continued use of [cigarettes] is not a defense to liability but rather forms the very basis for liability." Garner, Cigarette Dependency and Civil Liability of Cigarette Manufacturers: A Modest Proposal, 53 So. Cal. L. Rev. 1423, 1449 (1980).

The Association has discussed the facts that are specific to this because the case at bar is typical of many other cases involving smokers who were not able to stop smoking.

FACTS

Reports of tobacco addiction go back at least as far as King James. Note, Plaintiffs' Conduct as a Defense to Claims Against Cigarette Manufacturers, 99 Harv. L. Rev. 809, 812-813 (1986). Scientific literature from the early 1900s and from the 1920s and 1930s reported that nicotine was responsible for the "compulsive" use of tobacco. Surgeon General's Report on Nicotine Addiction, pp. 6, 10. Plaintiff, who was born in 1928, started smoking when he was 12 years old. See Depo., Vol. I, pp. 113, 114 and

Videotape depo., Direct Examination, p. 40. Plaintiff, in 1986, after he suffered a seizure, was diagnosed as having cancer of the lung and brain. Gilboy June 16 depo., p. 23. This seizure occurred approximately six years after the 1980 effective date of the amendment to Civil Code art. 2323.

In 1940, when plaintiff started smoking, the cigarette manufacturers, as shown by the Surgeon General's Report, had the reports of addiction available to them. The Surgeon General's Report on Nicotine Addiction reported that the risks of addiction were available from the early 1900s:

> "Since the early 1900s scientific literature and historical anecdotes have provided evidence that tobacco use is a form of drug addiction." *The Health Consequences of Smoking: Nicotine Addiction*, A Report of the Surgeon General, 1988. Overview, p. 6. A copy of the full report is being filed with this amicus brief.

> "As early as the 1920s and 1930s, some investigators were concluding that nicotine was responsible for the *compulsive* use of tobacco products (Armstrong-Jones 1927; Dorsey 1936; Lewin 1931). Johnston (1942) concluded that, 'smoking tobacco is essentially a means of administering nicotine, just as smoking opium is a means of administering morphine.'" (Emphasis added.) *Id.*, p. 10.

Indeed, it has been noted that, as early as 1604, "King James is said to have been disgusted at the fact that tobacco users were 'obstinately addicted.'" Plaintiffs' Conduct as a Defense to Claims Against Cigarette Manufacturers, 99 Harv. L. Rev. at 815 n.35. (A copy of the note is attached as Ex. 1.)

In order to assuage whatever concerns potential smokers might have had about smoking the manufacturers advertised that "Distinguished authorities point out . . . [t]hat there is no

proof that cigarette smoking is one of the causes [of lung cancer]." See Advertisement of the Tobacco Industry Research Committee adopted by the cigarette manufacturers. Supp. Record, p. 20. (A copy of the advertisement is attached as Ex. 2.)

And, *even in 1954*, cigarette manufacturers — including the defendant manufacturers herein — were advertising that "We believe that the products we make are not injurious to health." *Id.*

Surgeon General Koop, in his 1988 Report on Nicotine Addiction, noted:

> "This Report shows conclusively that cigarettes and other forms of tobacco are addicting in the same sense as are drugs such as heroin and cocaine." C. Everett Koop, M.D., Sc.D., Surgeon General. *Id.*, p. vi.

The report also includes other conclusions as to the addictive consequences of smoking:

> "Despite the significant health risks of tobacco use outlined in previous reports, many smokers have great difficulty in quitting. This report concludes that such difficulty is in large part due to the addicting properties of nicotine, which is present in all forms of tobacco." Otis R. Bowen, M.D., Secretary, U.S. Dept. of Health and Human Services. Transmittal letter to George Bush, President, Surgeon General's Report.

> "The pharmacologic and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine." Conclusion from Chapter V: Tobacco Use Compared to Other Drug Dependencies. *Id.*, p. 15.

In light of the addictive qualities of defendants' products, is it any wonder that plaintiff could not quit smoking. Defendants' counsel asked plaintiff whether he knew, when he started, that it would be difficult for him to quit. Of course, the defendants never warned Mr. Gilboy that he could become addicted. However, now they try to use his addiction as a defense. In any event, plaintiff responded: "*I didn't know how difficult it would be.*" (Emphasis added.) Video Depo., Cross-examination, p. 18. Even with the addiction, plaintiff was able to stop for 8 days. Here is what happened:

> "Q. You went to see the doctor, and he suggested that you stop smoking?
>
> "A. Oh, yeah.
>
> "Q. Did you stop smoking?
>
> "A. I went eight days, okay., *and I was climbing walls that were nonexistent*, and I never did go back to see him as a patient again." (Emphasis added.) Transcript of video-deposition, cross-examination, p. 136.

Mr. Gilboy's testimony as a sufferer reflects what the scientific literature has reported since at least the 1920s. Mr. Gilboy stated: "*Sir, I could have given up heroin more quickly than I could cigarettes.*" Depo., p. 34, Supp. Record, p. 14. (Emphasis added.)

Do the defendants warn about addiction now? They talk about preemption. That is a false defense. They refuse to place *any* warning labels on any cigarettes that they export *unless* the importing country requires the warnings. Ex. 3. They don't even warn about cancer. So much for their good faith. And when they get sued, they claim that the cancer is the smoker's fault because he smoked. The companies will continue to sell cancer until they know that they will have to pay for the needless deaths and the needless suffering that

they inflict — unless they are prohibited from claiming that the addiction that they have caused is a defense against people being able to recover for cancer and death.

ARGUMENT

I. THE COURT OF APPEAL ERRED AS A MATTER OF LAW WHEN IT STATED THAT THE DEFENDANTS OWED NO DUTY OF CARE TO THE PLAINTIFF. THAT ANALYSIS INJECTED THE PROHIBITED ASSUMPTION OF RISK DOCTRINE INTO A DUTY/RISK ANALYSIS "THROUGH THE BACK DOOR"

The court of appeal, in affirming the trial court's granting of defendants' motion for summary judgment, erroneously held that plaintiff voluntarily smoked and that "smoking cigarettes is a simple consumer decision entered into with warnings of the possible consequences." *Gilboy* v. *American Tobacco Co.*, 572 So. 2d 289, 290 (La. App. 1st Cir. 1990). The court of appeal also erroneously held the following:

> "[W]e are unable to classify health injuries from a lifetime of *voluntary* smoking as accidental. Choices have consequences. Mr. Gilboy chose to begin and *continue smoking*, knowing that it was dangerous to his health. He now looks to the courts to protect him or at least somewhat insulate him from a series of daily decisions stretching from the present all the way back to the 1940's, when he was a teenager." (Emphasis added.) *Id.* at 291.

In so stating, the court ignored the plaintiff's own testimony about his addiction and what occurred when he tried to stop: "I was climbing walls that were non-existent." The court therefore did what was prohibited in deciding a motion for summary judgment — it ruled on a question of fact with regard to which there was a genuine issue when it held that

plaintiff voluntarily continued to smoke. It also ignored the Report of the Surgeon General that nicotine was addictive and that the addiction would prevent people from being able to stop smoking. The court, after its statement about the warnings, added the following:

> "Mr. Gilboy had the legal right to choose to smoke. He also had the knowledge that this could seriously jeopardize his health. The law would protect him from a product that had a hidden defect. The law would protect him from a product that lacked an adequate warning. The law would even protect him from harm arising from the misuse of a defective product. However, the law will not protect him from himself. Based on the uncontested facts of record in this case, we conclude as a matter of law that the risk complained of by the plaintiff *is not within the ambit of protection of the duty of care required of a cigarette manufacturer*." (Emphasis added.) 572 So. 2d 291-292.

When the court stated that "[t]he law would protect him from a product that lacked an adequate warning," it ignored the fact that the original warnings on cigarettes were indeed inadequate. The tobacco companies, for obvious reasons, never gave the following warning: "We will get you as hooked on cigarettes as you would be on heroin." Even now, they refuse to put *any* warnings on cigarette that they export to foreign countries — unless they are required to do so by the laws of the the foreign countries. See Ex. 3.

The court of appeal's holding of "no duty" is virtually identical to the very holding of "no duty" that was prohibited by this Court in *Murray* v. *Ramada Inns, Inc.*, 521 So. 2d 1123 (La. 1988). In *Murray*, this Court rejected an identical "no duty" defense. It first stated the defense argument:

> "Another argument raised by the defendants deserves attention here, because in light of our holding

> today, similar arguments might arise in future cases. Defendants suggest that, leaving aside the doctrine of assumption of risk, they should not be liable because they had *no duty* to protect the decedent from a danger of which he had knowledge. In essence, defendants contend here that they were *not negligent* because the plaintiff voluntarily encountered the risk." *Murray* v. *Ramada Inns, Inc.*, 521 So. 2d 1123, 1135 (La. 1988). (Emphasis by the court.)

In rejecting that argument, this Court held:

> "The Fifth Circuit wisely rejected this contention. 821 F.2d at 276. If accepted, defendants' argument would inject the assumption of risk doctrine into duty/risk analysis '*through the back door*.' By that, we mean that the argument attempts to define the defendant's initial duty in terms of the plaintiff's actual knowledge, and thereby seeks to achieve the same result which would be reached if assumption of risk were retained as a defense, i.e., a total bar to the plaintiff's recovery.
>
> "A defendant's duty should not turn on a particular plaintiff's state of mind, but instead should be determined by the standard of care which the defendant owes to all potential plaintiffs." *Id.*, at 1136.

The defendants' "no duty" argument was rejected in another cigarette case by the Supreme Court of New Jersey. *Dewey* v. *R.J. Reynolds Tobacco Co.*, 577 A.2d 1239 (N.J. 1990). The supreme court in *Dewey* noted:

> "Defendants' argument completely ignores the extensive efforts of the tobacco manufacturers to saturate the public with information regarding the benefits of cigarette smoking, the aim of which is to rebut the assertions of public-health advocates and the Surgeon

General. We note that in the ensuing quarter-century since the 1964 Surgeon General's Advisory Committee Report, government interest in the societal cost and hazards of smoking has not abated. A bill recently introduced in Congress would provide for grants for advertisements to discourage smoking, the sponsor charging that 'tobacco companies target [] women, teenagers and minority groups for their new products and advertising.' New York Times, Feb. 21, 1990, at A18. Public opinion surveys as well as Federal Trade Commission reports suggest that the tobacco companies' efforts at rebuttal have been successful, thus raising a material issue of fact regarding consumer awareness of the dangers of smoking. Federal Trade Commission, *Report to Congress, Pursuant to the Federal Cigarette Labeling and Advertising Act*, June 30, 1967. We are unable, therefore, to decide that as a matter of public policy, manufacturers of cigarettes should be immunized from liability for the harms caused by their products." *Id.* at 1254-1255. (A copy of the opinion is attached. Ex. 4.)

Thus, the defendants may not escape liability based on a "no duty" defense.

II. "ASSUMPTION OF RISK" IS NO LONGER AVAILABLE AS A DEFENSE UNDER LOUISIANA LAW

When the court of appeal held that Mr. Gilboy voluntarily continued to smoke and that his voluntary smoking was a total bar, it in essence held that plaintiff assumed the risk of his smoking. This Court has rejected that very holding. This Court, in 1988, responded to a question that had been certified to it by the United States Court of Appeals for the Fifth Circuit. In its response, this Court squarely held:

"[T]he common law doctrine of assumption of risk no longer has a place in Louisiana tort law. The types of plaintiff conduct which the defense has been used to describe are governed by civilian concepts of comparative fault and duty/risk. Assumption of risk should not survive as a distinct legal concept for any purpose, and certainly can no longer be utilized as a complete bar to the plaintiff's recovery.

"Because the term 'assumption of risk' is almost always used to describe plaintiff conduct that is indistinguishable from contributory negligence, it would make no sense for us to hold otherwise. Under article 2323, plaintiff negligence results only in a comparative reduction of recovery, and it would be anamolous [sic] for us to hold that the same conduct which results only in a reduction of recovery when it is described as 'comparative negligence' somehow should operate as a total bar to recovery when described as 'assumption of risk.' As another state supreme court considering this issue has concluded, 'it would be the ultimate legal inconsistency to reject contributory negligence as an absolute defense yet at the same time allow its effect to continue under the guise of assumption of risk.' *Salinas* v. *Vierstra*, 107 Idaho 984, 695 P.2d 369, 374 (1985)." *Murray* v. *Ramada Inns, Inc.*, *supra*, 521 So. 2d at 1132-1133.

Thus, an assumption of risk defense would be improper under Louisiana law. Defendants argue that plaintiff knew of all the risks of smoking and therefore they cannot be liable to plaintiff for his cancer. Interestingly, they seem to disassociate themselves from a claim that this is an assumption of risk defense — although that is really their argument. They also urge the prohibited "no duty" argument. For instance, in distinguishing *Murray*, appellees state:

> "The issue of assumption of risk is not even reached in cases such as this one, in which the defendants either owed no duty because of the well-known nature of the alleged risks of smoking, or did not breach the duty owed, due to a lack of proximate cause between the alleged failure to warn and Mr. Gilboy's injuries." Original Brief of Defendant-Appellees, p. 15.

However, that argument fails because it attempts to gloss over two critical issues in this case: whether plaintiff, *when he started smoking at age 12*, was warned that he could become addicted and, even if he was so warned, whether a 12-year-old could have sufficient experience to understand the risk of addiction.

III. COMPARATIVE NEGLIGENCE AND NOT CONTRIBUTORY NEGLIGENCE SHOULD BE APPLIED IN THIS CASE

Plaintiff, in 1986, was diagnosed as having cancer of the lung and brain. Gilboy June 16 depo., p. 23. This seizure occurred approximately six years after 1980 which year was the year that the amendment to Civil Code art. 2323 became effective.

Plaintiff had no cause of action for his lung cancer until he knew that he had that cancer. Therefore, the comparative negligence that was provided by the amendment to article 2323 applies. Thus, plaintiff's contributory negligence, if any, would not bar — but would only reduce — his claim. The amount of the reduction, if any, would be a question for the jury and is certainly not a question that is subject to summary judgment.

Indeed, comparative negligence — and not contributory negligence — would apply to Mr. Gilboy's claim even if article 2323 had not been amended. As this Court pointed out after discussing the history of the previous version of article

2323: "Contributory negligence has never been part of our legislated law and is now expressly prohibited by statute." *Bell* v. *Jet Wheel Blast*, 462 So. 2d 166, 171 (La. 1985). *It should be noted that the Bell accident arose prior to the enactment of the amendment to article 2323.* (The dissent of Justice Marcus makes clear that the accident in *Bell* occurred before August 1, 1980, the effective date of the amendment. *Id.* at 174.) This Court, in responding to a certified question from the United States Fifth Circuit Court of Appeals, held that contributory negligence was no defense to the plaintiff's strict product liability claim that arose prior to the amendment. Rather, this Court held that comparative fault should be applied to that pre-amendment case. *Id.* at 173. A later court of appeal has also noted that comparative negligence has always been the proper legal defense in Louisiana. *Walker* v. *Maybelline Co.*, 477 So. 2d 1136, 1140 (La. App. 1st Cir. 1985), writ den. 481 So. 2d 1333: "We note that contributory negligence is no longer a defense in products liability cases. Rather, the proper defense under the Civilian system has always been comparative negligence."

Thus, the defense that should be applied in the case at bar is one of comparative negligence and not one of contributory negligence.

IV. DEFENDANTS SHOULD BE BARRED FROM RAISING THE DEFENSE THAT PLAINTIFF WAS NEGLIGENT IN CONTINUING TO SMOKE AFTER HE BECAME ADDICTED. CIGARETTE MANUFACTURERS SHOULD NOT BE ABLE TO TAKE ADVANTAGE OF THE VERY ADDICTION THAT THEY HAVE CAUSED

According to the Surgeon General's report, early scientific literature reported that tobacco use is addictive:

"Since the early 1900s scientific literature and historical anecdotes have provided evidence that tobacco use is a form of drug addiction.

* * *

"As early as the 1920s and 1930s, some investigators were concluding that nicotine was responsible for the *compulsive* use of tobacco products (Armstrong-Jones 1927; Dorsey 1936; Lewin 1931). Johnston (1942) concluded that, 'smoking tobacco is essentially a means of administering nicotine, just as smoking opium is a means of administering morphine.'" (Emphasis added.) Surgeon General's Report, pp. 6, 10.

One author has explored in depth the liability of cigarettes manufacturers for their failure to warn smokers of addiction. Garner, Cigarette Dependency and Civil Liability of Cigarette Manufacturers: A Modest Proposal, 53 So. Cal. L. Rev. 1423, 1434-1465 (1980). He has noted that "[t]he plaintiff's continued use of [cigarettes] is not a defense to liability but rather forms the very basis for liability." *Id.* at 1449. That very basis would apply in Louisiana.

Under Louisiana law, a manufacturer is presumed to know the defects of his products. See, *e.g.*, *Spillers* v. *Montgomery Ward & Co., Inc.*, 294 So. 2d 803, 807 (La. 1974). It would be a "Catch 22" travesty to permit a cigarette manufacturer to sell an addicting product and then be able to claim that the addicted plaintiff's recovery should be reduced because that addicted plaintiff failed to stop smoking.[1] See *Boyer* v. *Johnson*, 360 So. 2d 1164 (employer of minor not permitted to raise the defense of contributory negligence of

[1] The argument of the manufacturers is similar to the classic story of the criminal defendant who shoots both of her parents and then pleads for mercy because she is an orphan.

the minor). As Prof. Alston Johnson has pointed out with regard to the new Civil Code art. 2323:

"[C]ontributory negligence is not applicable when defendant is negligent and his duty extends to the protection of plaintiff against his own carelessness. Such cases correspond to category (a) previously discussed." (Footnote omitted.) Comparative Negligence and the Duty/Risk Analysis, 40 La. L.R. 319, 339 (1980).

Cf., *e.g.*, *Clair* v. *Paris Road Drugs, Inc.*, 573 So. 2d 1219 (La. App. 4th Cir. 1991), writ den. __ So. 2d __. Plaintiff, a major, sued a pharmacist for illegally refilling prescriptions. She was aware of what she was doing and was not addicted *when she began* soliciting the drugs from the pharmacist. "Under a different factual setting" there might not be a reduction for comparative negligence. *Id.* at 1225.

If the plaintiff's smoking is admissible as a potential defense, it is certainly a jury question as to whether the plaintiff *voluntarily* continued to smoke or whether his addiction stopped him from breaking his habit. Plaintiff testified as to what happened on one occasion when he tried to stop smoking:

"Q. You went to see the doctor, and he suggested that you stop smoking?

"A. Oh, yeah.

"Q. Did you stop smoking?

"A. I went eight days, okay, and I was climbing walls that were nonexistent, and I never did go back to see him as a patient again." Video deposition, cross-examination, p. 136.

Mr. Gilboy also testified: "Sir, I could have given up heroin more quickly than I could cigarettes." Gilboy Depo., p. 34, Supp. Record, p. 14.

A jury would be entitled to decide whether plaintiff's failure to stop was caused by his nicotine dependence or whether he "voluntarily" decided to continue to smoke. Thus, again, the summary judgment should have been denied.

V. CIGARETTES ARE UNREASONABLY DANGEROUS PER SE BECAUSE THEY MAKE PEOPLE ADDICTS AND BECAUSE THEY KILL PEOPLE

The defendants are liable under strict liability. They are also liable for their negligence in producing a product that was more dangerous than it was intended to be. They are also liable because they knew or should have known of the addictive character of their cigarettes and were therefore negligent in failing to warn smokers that their cigarettes convert smokers into addicts.

It has been noted that as early as 1604, "King James is said to have been disgusted at the fact that tobacco users were 'obstinately addicted.'" Plaintiffs' Conduct as a Defense to Claims Against Cigarette Manufacturers, 99 Harv. L. Rev. at 815 n.35, Ex. 1. The Surgeon General's Report notes that scientific literature has, since the early 1900s, reflected the addiction. Surgeon General's Report, pp. 6, 10. As noted these publications predated 1940 when plaintiff started smoking at the age of 12.

Defendants note that "[t]o find a product unreasonably dangerous per se, a jury would have to determine that the product was 'too dangerous to be placed on the market.'" Appellees Brief, p. 19, citing *Halphen* v. *Johns-Manville Sales Corp.*, 484 So. 2d 110, 118 (La. 1986). Were cigarettes

"too dangerous in 1940 to be placed on the market?" *Suppose cigarette companies between 1940 and 1966 had to apply to the Food and Drug Administration to obtain F.D.A. approval to market their product as a drug.* Is there any doubt that they would not have been able to obtain that approval. A drug that kills 300,000 persons per year would certainly never obtain approval. Thus, regardless of the knowledge or lack of knowledge of the defendants as to the addictive effects of their cigarettes, they are liable for their products because those products are unreasonably dangerous per se. Were the defendants also negligent in failing to warn about the addiction? Certainly they were. At the *bare* minimum, the failure to warn is a jury question. *Perhaps* after 1966 the failure to warn argument is preempted. However, it should be noted that the United States Fifth Circuit has held that the plaintiff's "unreasonably dangerous claims" under *Halphen* were not preempted by the Cigarette Labeling Act. *Pennington* v. *Vistron Corp.*, 876 F.2d 414, 417 et seq. (5th Cir. 1989). In any event, plaintiff's unreasonably dangerous claim is clearly available for sales up to 1966. Plaintiff's strict liability claim would also predate the 1966 Labeling Act and would be available regardless of whether preemption applies.

Indeed, in another cigarette cancer case, an Indiana court noted that a cigarette manufacturer's failure to warn of the addictive properties of cigarettes could render the cigarettes unreasonably dangerous. The court held:

> "Failing to warn the consumer of certain properties, such as nicotine addiction, in conjunction with its harmful qualities, render the product unreasonably dangerous, *i.e.* in a condition the ordinary consumer would not contemplate." *Rogers* v. *R.J. Reynolds Tobacco Co.*, *supra*, 557 N.E.2d at 1053 n.8. Ex. 5.

The addictive properties of the cigarettes — if nothing else — make those products unreasonably dangerous per se under *Halphen*. Further, under *Halphen*, the defendants are responsible for their negligence in selling addictive cigarettes because they either knew or should have known of the prior literature about those addictive properties. They are therefore clearly liable under *Halphen* for the cigarettes they sold prior to 1966 and the addiction and the cancer they caused. Further, they are liable for their post-1966 sales because, as additionally discussed below, the Labeling Act did not preempt the unreasonably dangerous per se claim under *Halphen*.

VI. PREEMPTION IS NO DEFENSE

It should be noted that there is no preemption of *Halphen*-type claims that cigarettes are unreasonably dangerous. *Pennington* v. *Vistron Corp.*, 876 F.2d 414 (5th Cir. 1989), discussed *supra*. Further, at least one state supreme court has rejected cigarette manufacturers' arguments that the Labeling Act preempted a plaintiff's claims for the wrongful death of her husband. *Dewey* v. *R. J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1251 (N.J. 1990). Ex. 4. *Contra*, *Rogers* v. *R.J. Reynolds Tobacco Co.*, 557 N.E.2d 1045, 1051 (Ind. App. 1990). Ex. 5. However, the court in *Rogers* did hold that preemption did not apply to conduct that preceded January 1, 1966.

It should also be noted that the United States Supreme Court, on March 25, 1991, granted a writ of certiorari in a case that involves the preemption issue. *Cipollone* v. *Liggett Group, Inc.*, No. 90-1038, 59 U.S.L.W. 3543. The Supreme Court granted certiorari *in a petition filed by the plaintiff* from *Cipollone* v. *Liggett Group, Inc.*, 893 F.2d 541 (3d Cir. 1990).

VII. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT

Defendants are not entitled to a summary judgment for a variety of reasons. Some of those reasons have already been discussed and will be discussed in further detail below.

A. Plaintiff became addicted to nicotine and could not stop smoking. It is at least a jury question whether plaintiff was warned of his potential addiction, whether he "voluntarily" continued to smoke

Defendants, in an attempt to evade the holding and logic of *Murray*, argue that there was no proximate cause "between the failure to warn and Mr. Gilboy's injuries." Putting aside, for the sake of argument, whether a 12-year-old could be adequately warned of the potential addiction, at the bare minimum it is a jury question as to the warning and whether there was proximate cause. As has been noted in the Harvard Law Review:

> "Competence determinations are a complex factual matter, requiring a retrospective analysis of a plaintiff's knowledge, mental capacity, and awareness of the risks as a minor. In the cigarette cases, the industry will have to face the allegation that it has deliberately appealed to minors, 'seducing' them to become cigarette addicts before they were competent to assess the risks of smoking." (Footnotes omitted.) Note, Plaintiffs' Conduct as a Defense to Claims Against Cigarette Manufacturers, 99 Harv. L. Rev. 809, 813 (1986). Ex. 1.

In another cigarette cancer case, an Indiana Court of Appeals rejected the same "lack of proximate cause" argument that defendants are raising here:

"[Decedent Richard Rogers's] knowledge also may be relevant to the element of causation. However, we note the trial court could not have granted summary judgment on the ground the Defendants' failure to warn of the addictive properties of their cigarettes was a contributing cause of Richard's injury. Defendants did not negate the existence of issues concerning whether Rogers's admission that cigarettes were 'more than just habit forming' evidenced his knowledge he suffered from a clinical condition, i.e., addiction, and whether a warning which adequately conveyed that fact to him would have altered his conduct as far as the type of treatment he might have sought to overcome the addiction. Also, Richard's use of the term 'addiction' to describe his compulsion to smoke cigarettes merely raises a factual issue concerning whether he was aware of the clinical implications of his condition." *Rogers* v. *R.J. Reynolds Tobacco Co.*, 557 N.E.2d 1045, 1054 n.10 (Ind. App. 1990), Ex. 5.

Just as there were jury questions in *Rogers* regarding the decedent's addiction, so there are jury questions in the case at bar as to the plaintiff's addiction.

B. There are jury questions as to whether, in 1940, plaintiff, a 12-year-old, knew of the addictive qualities of cigarettes and whether, in 1940, members of the public had such knowledge

The Indiana appellate court in *Rogers* rejected the defense argument that cigarette manufacturers were entitled to a summary judgment since the addicting "properties" of cigarettes were well known in 1940. (Mr. Gilboy, who was born in 1928, and who started smoking when he was 12, would have started in or around 1940. See Depo., Vol. I, pp.

113, 114 and Videotape depo., Direct Examination, p. 40.) The court in *Rogers* stated:

> "Defendants argue the 'health risks' of smoking are well within the contemplation of the ordinary consumer possessing ordinary knowledge common to the community as to the characteristics of cigarettes and that the habituating propensities of smoking have long been common knowledge.' Appellee's Brief at 20. However, Yvonne [Rogers] draws a distinction between the addictive, as opposed to habituating, qualities of cigarettes. There is no basis for our judicially noticing what the ordinary consumer's knowledge concerning the addictive qualities of cigarettes may have been when Richard began smoking in 1940. The state of knowledge attributable to the community of individuals consuming cigarettes has changed over time and will continue to do so. It was not until 1988 that the Surgeon General published a report informing of the addictive nature of cigarettes.
>
> * * *
>
> "As for cigarettes, the record is devoid of any evidence as to the state of the common knowledge of the consumer as to the addictive qualities of cigarettes at the time Richard began smoking." (Footnote omitted.) *Id.* at 1054.

In rejecting the defense argument, the court concluded:

> "We cannot state, as a matter of law, that knowledge of health risks associated with cigarettes overshadows knowledge of the risk of developing an addiction to cigarettes which, if medically unchecked, will result in the consumer's involuntary progression toward debilitating disease and probable death. Instead, it is a question of fact whether a consumer who chooses to use

cigarettes without knowledge of the risk of addiction to the cigarettes, which would prevent him from discontinuing use of the cigarettes and incurring the associated health risks, does so unreasonably." *Id.* at 1055.

Similarly, in the case at bar, there are questions of fact regarding addiction that preclude a summary judgment.

The law is clear, of course, that summary judgments "should be used cautiously and sparingly; any reasonable doubt should be resolved against mover in favor of full trial on the merits." *Penalber* v. *Blount*, 550 So. 2d 577, 583 (La. 1989). Further, "it is rarely appropriate for a determination based on subjective facts such as intent, motive, malice, knowledge or good faith." *Id.* In the case at bar, the question of whether plaintiff's continued smoking was voluntary is a subjective fact that would make a summary judgment particularly inappropriate. Further, the question of the "knowledge" of a party is also not appropriate for disposition by summary judgment. *Rodgers* v. *Johnson*, 557 So. 2d 1136, 1139 (La. App. 2d Cir. 1990).

There are a variety of factual issues that must be determined. Some of those issues are:

1. Should the defendants have warned that smokers could become addicted to nicotine?

2. Was plaintiff's failure to stop smoking "voluntary"?

3. Did plaintiff fail to stop smoking because he was addicted to nicotine?

4. What percent of fault lies with plaintiff and what percent of fault lies with defendants?

5. Assuming, for the sake of argument, that actual knowledge of the defendants was required, did defendants have actual knowledge that they were causing people to become addicted?

6. Should defendants have known of the scientific literature of the 1900s that smokers were becoming addicted to nicotine?

7. Were defendants negligent in failing to warn the plaintiff of health and addiction risks?

8. Are cigarettes unreasonably dangerous?

Those issues present genuine issues of fact and preclude summary judgment in the case at bar.

CONCLUSION

It is respectfully submitted that the judgment of the court of appeal should be reversed and that the case should be remanded for a trial on the merits.

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No. 01-835

IN THE

Supreme Court of the United States

SAO PAULO STATE
OF THE FEDERATIVE REPUBLIC OF BRAZIL,

Petitioner,

v.

THE AMERICAN TOBACCO CO., INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY FOR THE PETITIONER

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REPLY FOR THE PETITIONER

In square conflict with decisions of this Court and other circuits, the Fifth Circuit in this case held that a district judge "abused his discretion" by not disqualifying himself based on allegations of bias that were not only indisputably false but also utterly attenuated to the case before him. Respondents devote most of their brief in opposition ("BIO") to irrelevant issues and to an assertion of potential mootness that is as meritless as it is convoluted, none of which undermine the Petition. Six respected judges correctly explained, in essentially imploring this Court to grant certiorari, that the decision below "disregards the unanimous voices of other U.S. Courts of Appeals" and "clearly call[s] into question the oath we take when we become federal judges." Pet. App. 8a, 13a. This case accordingly presents the Court with an important opportunity to articulate the standards governing frequently recurring demands for judicial disqualification. Certiorari should be granted.

I. Respondents Gravely Mischaracterize MDL Rules And The *Panama* And *Sao Paulo* Cases.

Respondents principally address an irrelevant issue: whether Judge Barbier should have waited for the MDL Panel to decide whether to consolidate the various foreign tobacco cases so that, if consolidation occurred, the transferee court could have decided the remand question. See generally Reply App. 1a-2a (orderly chronology of events haphazardly cited by respondents). Of course, respondents bury in a footnote on page 16 that the transferee court later explicitly *agreed* with Judge Barbier's ruling (see *In re Tobacco (Venezuela)*, 100 F. Supp. 2d 31, 38 n.3 (D.D.C. 2000)), rendering much of the BIO entirely disingenuous. Moreover, Judge Barbier faithfully followed MDL Rule 1.5, which (as respondents "grudgingly acknowledge[d]" below (Pet. App. 42a)) specifies that MDL proceedings "do[] not affect or suspend orders and pretrial proceedings in the district court in which the action is pending and do[] not in any way limit the pretrial jurisdiction of that court."

Respondents nonetheless erroneously contend that, despite Rule 1.5, district courts uniformly stay action on remand motions, that the MDL panel has approved this practice, and that Judge Barbier's denial of a stay was thus "a patent abuse of discretion." BIO 11 n.*, 18. Judge Barbier cogently explained that respondents had taken the quotation on which they rely entirely out of context. See Pet. App. 42a (explaining that, in context, MDL chairman's statement that "'that is the way [the district courts] do it'" was a "*lament*" (emphasis added)). Indeed, both the Fifth Circuit and the MDL Panel have recently reaffirmed the longstanding rule that district courts are completely free to rule on remand motions while MDL proceedings are pending. *Rio de Janeiro* v. *Philip Morris, Inc.*, 239 F.3d 714, 715 (CA5 2001); *In re Asbestos Prods. Liab. Litig.*, 170 F. Supp. 2d 1348, 1349 n.1 (MDL 2001). Not only do district courts *routinely* do so,[1] but there is a substantial view that a district court *must* rule on a pending remand motion without granting a stay because it cannot "stay proceedings over which it lacks jurisdiction." *Lloyd* v. *Cabell Huntington Hosp.*, 58 F. Supp. 2d 694, 696 (S.D.W. Va. 1999).[2]

Respondents nonetheless criticize Judge Barbier for not staying the *Sao Paulo* case because, by that date, the MDL Panel had consolidated other foreign tobacco suits and could have soon decided whether to transfer the *Sao Paulo* case as well. Not only does Rule 1.5 specify, and MDL and Fifth Circuit precedent establish, that no such stay is appropriate, but a stay would have been uniquely inappropriate in this case because

[1] For very recent examples, see *Mauck* v. *Warner-Lambert Co.*, No. 7:01-CV-027-R, 2001 U.S. Dist. LEXIS 5919, at *5-*7 (N.D. Tex. May 7, 2001); *Triad Indus.* v. *UPS*, No. 00-cv-0619-MJR, 2000 U.S. Dist. LEXIS 18824, at *2-*3 (S.D. Ill. Nov. 17, 2000); *Farkas* v. *Bridgestone/Firestone, Inc.*, 113 F. Supp. 2d 1107, 1115 n.8 (W.D. Ky. 2000); *Fu's Garden Restaur.* v. *ADM Co.*, No. C 99-5452, 2000 U.S. Dist. LEXIS 6799, at *2 n.1 (N.D. Cal. May 12, 2000); *Havens Protected "C" Clamps* v. *Pilkington PLC*, No. 00-2035-JWL, 2000 U.S. Dist. LEXIS 4905, at *4-*5 (D. Kan. Mar. 29, 2000).

[2] Respondents' assertion that 26 of the 27 other foreign tobacco cases were *eventually* "formally or informally" stayed (BIO 10 n.*, 11 n.*) is misleading. At the time Judge Barbier heard argument on the *Panama* remand motion (Mar. 17, 1999), only one court had entered such a stay.

Judge Barbier had already ruled that removal was improper, and that he lacked jurisdiction, in the indistinguishable *Panama* case. When respondents attempted to remove this case notwithstanding his controlling *Panama* ruling, Judge Barbier rightly viewed himself as without jurisdiction to do anything but remand it as well. Judge Barbier also correctly concluded that MDL consolidation could not have resulted in uniform treatment of foreign tobacco suits because, by that time, two cases had already been remanded to state court. See Pet. App. 41a.[3]

II. Respondents' Convoluted Contention That The Petition May Become Moot Is Meritless.

Respondents' mootness argument seems to be as follows: (i) in a separate suit brought by Venezuela, the D.D.C. has endorsed Judge Barbier's rulings that the federal courts lack jurisdiction over foreign tobacco cases (see *supra* at 1); (ii) the D.C. Circuit may soon reject respondents' pending challenge to the *Venezuela* decision; and (iii) if so, the D.D.C. may, in turn, invoke its *Venezuela* ruling to remand the *Sao Paolo* case to state court as well, a result that supposedly would provide petitioner all the relief it seeks through this Petition. See BIO 18. Respondents' argument suffers from four distinct flaws.

First, as respondents know perfectly well, the scenario they posit *cannot possibly occur* because there is no motion to remand pending. Petitioners could not even file such a motion because (as respondents admit (BIO 16-17)), the case has long been stayed in the D.D.C.

Second, in any event, this Court regularly grants certiorari when ongoing proceedings in the lower courts create a potential for mootness.[4] The lower courts, however, consistently stay their proceedings while the case is *sub judice* in this Court.

[3] Respondents' invocation of the MDL Panel's "conditional transfer" of the *Sao Paulo* case (BIO 13-14) is misleading because they fail to advise the Court that on April 24, 2000 – two weeks after the Order they cite and before Judge Barbier ruled – the MDL Panel *stayed* the conditional transfer.

[4] For example, that is generally true in cases in which the court of appeals has remanded to the district court. See, *e.g.*, Cert. Reply, No. 01-682, *Barnes* v. *Gorman*, at 5-6 (collecting cases), *cert. granted*, 122 S. Ct. 865 (2002).

Here, even that additional step would be unnecessary, for (as noted) the D.D.C. has already stayed the case. If the D.C. Circuit rejects respondents' challenge to the D.D.C.'s *Venezuela* decision, and the D.D.C. subsequently considers lifting the stay in this case so that petitioner could file a motion to remand, petitioner will seek (and no doubt receive) a further stay of any proceedings until this Court rules on the merits.

Third, in any event, a remand by the D.D.C. would not provide petitioner with all the relief it seeks. Petitioner has a constitutionally sufficient interest in pursuing this Petition because, if petitioner prevails, this Court's judgment would reverse the Fifth Circuit's order taxing petitioner, as the losing party on appeal, with costs (see Pet. App. 28a). Cf. *University of Texas* v. *Camenisch*, 451 U.S. 390 (1981).[5]

Fourth, this would be an inappropriate context to interpret the mootness doctrine to frustrate review in this Court. This Petition implicates not just petitioner's interests but the integrity of a sitting federal judge who is disabled from challenging the decision below. In case of doubt, the interests of justice therefore militate in favor of finding an ongoing controversy.[6]

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[5] Petitioner also has a significant interest in ensuring that the Eastern District of Louisiana (not the D.D.C.) remands the case. Parties regularly seek other relief from federal court, including injunctions against the state court proceedings, which would lie within the remanding court's jurisdiction. Of note, petitioner would benefit from the Fifth Circuit's narrow interpretation of the federal courts' power under the All Writs Act to interfere with state court proceedings. Compare *Texas* v. *Real Parties In Interest*, 259 F.3d 387 (CA5 2001), *cert. denied*, 70 U.S.L.W. 3463 (No. 01-775, Jan. 22, 2002) with *United States* v. *District of Columbia*, 654 F.2d 802 (CADC 1981).

[6] Respondents' alternative argument – that respondents believe that, if the D.C. Circuit instead *reverses* the D.D.C.'s *Venezuela* remand ruling, they will eventually prevail on the merits (BIO 18-19) – only illustrates another respect in which petitioner has a substantial interest in pursuing this Petition. If this Court reverses the Fifth Circuit's judgment in this case, the D.D.C.'s rulings will be void for lack of jurisdiction; that was precisely *respondents'* logic in successfully arguing that Judge Barbier's remand ruling was void because he had improperly failed to recuse himself. Nor would it "make little sense" to reverse any judgment on the merits (contra *id.* 18), something that this Court does with regularity. In any event, the claims in this case, which rest on *non-federal law*, are entirely viable on the merits.

III. The Petition Satisfies All Certiorari Criteria.

A. The Fifth Circuit's Legal Holding Is Not "Fact-Bound," But Rather Directly Conflicts With Decisions Of Other Circuits.

Respondents' repeated assertion that the decision below is "fact bound" is most notable for two arguments that they do *not* make. *First*, they do not contend that the decision below is "fact bound" in the sense that facts implicating the Fifth Circuit's holding will not recur, for plainly they will. Obviously, *any* case on *any* subject matter can implicate the Fifth Circuit's ruling that a district judge must be disqualified as a matter of law based on a supposed pre-judicial association with a position on an issue raised by the case. *Second*, respondents do not contend that the circuit conflicts identified by the Petition actually reflect "fact-bound" differences in the cases. Notably, respondents' eight law firms were unable to articulate *any* difference between this case and those cited in the Petition, or to identify *any* other circuit that would reach the same result.

Respondents instead argue that the decision below is "fact bound" because disqualification is a "*fact-intensive*" issue. But, the facts still must be applied to a legal standard. See Pet. 12-13. Thus, respondents do not seriously dispute (i) that, in holding that disqualification is required *on these facts*, the Fifth Circuit necessarily embraced certain principles of law, (ii) that those principles will *a fortiori* require disqualification in commonly recurring circumstances, or (iii) that the Fifth Circuit recognized that its legal standard was outcome determinative by acknowledging that, even under its exceedingly lenient test, "this is a close case for recusal" (Pet. App. 36a).

The decision below does, in fact, rest on clear principles of law that conflict with other circuits' holdings – including by adopting the principle of "issue recusal," notwithstanding respondents' attempt to disavow that label – as is readily apparent from the BIO itself. Respondents principally argue that Judge Barbier held "key leadership positions" in the LTLA (BIO 21), which (in the *Gilboy amicus* brief) supposedly "took positions on core factual and legal issues" relevant to this case

and against the defendants in this case (*id.* 20), such that, even if Judge Barbier "was *not* involved in the preparation or approval of the *Gilboy* brief, a reasonable observer would nonetheless expect that Judge Barbier *shared the views* expressed by the Association in *Gilboy*" (*id.* 25 (all emphases in original)).

That rationale *is* "issue recusal," nothing more and nothing less. The Fifth Circuit and respondents contend that a reasonable person would believe that, because the LTLA took a particular legal position on an issue, Judge Barbier is biased in his disposition of this similar case. Other circuits – as well as the recusal opinions of the Chief Justice, Justice Breyer, and Judge Posner – *categorically* reject that proposition, recognizing that federal judges take a solemn oath of office to decide the cases before them impartially and that active pre-judicial involvement in matters is beneficial, not disqualifying. See Pet. 24-28 (citing, *inter alia*, *United States* v. *Snyder*, 235 F.3d 42, 48 (CA1 2000) ("Far from necessarily warranting recusal, typically such views merely mark an active mind."); *Cipollone* v. *Liggett Group*, 802 F.2d 658, 659 (CA3 1986) (if such a proposition were accepted, "then only the least informed and worst-prepared lawyers could be appointed to the bench"); *Laird* v. *Tatum*, 409 U.S. 824, 835 (1972) (Rehnquist, J.) (limiting judges to deciding issues on which they were "tabula rasa * * * would be evidence of lack of qualification, not lack of bias")).

Manifestly, other circuits would reach the opposite result in this case because the Fifth Circuit's holding necessarily embraces the most absurd, hyper-attenuated application of "issue recusal" imaginable. It is undisputed that Judge Barbier had *nothing* to do with the LTLA's *Gilboy amicus* brief, that his name did not even appear on the brief itself, and that he *never* litigated a tobacco case in his entire career as a private attorney. The LTLA is a general voluntary bar, not in any way specifically concerned with tobacco litigation. Moreover, despite respondents' overheated rhetoric, even the Fifth Circuit recognized that this case and *Gilboy* "may be distinguishable" and merely involved "similar" allegations (Pet. App. 35a). Finally, the *Gilboy* brief involved a single case filed nearly a decade before Judge Barbier assumed the bench, a consideration

that other circuits would deem determinative. See Pet. 23, 25 n.6. If the decision below is correct, every federal judge is disqualified as a matter of law from sitting in any case in which an organization for which he or she was an officer in the last decade took a position; disaffected litigants will therefore regularly investigate, and demand disqualification on the basis of, pre-judicial relationships with voluntary bar associations or other organizations that take positions on varied issues – from the Chamber of Commerce to the Lawyers' Committee for Civil Rights. Other circuits reject any such extraordinary suggestion.[7]

Respondents' alternative defense of the Fifth Circuit's decision merely highlights another square circuit conflict. They emphasize that the *Gilboy amicus* motion and the Louisiana Supreme Court's subsequent opinion identified, *inter alios*, Judge Barbier and one of petitioner's attorneys as the LTLA's counsel. BIO 21. But, given that the listing was *erroneous*, the Fifth Circuit held that disqualification was mandated only because, under that court's legal standard, a judge's undisputed and "on the record" representations do not remove the appearance of impropriety. Thus, the court of appeals ruled that Judge Barbier's representations "do not dissipate the doubts that a reasonable person would probably have about the court's impartiality" (Pet. App. 36a), a view that respondents embrace: "A reasonable observer here would at the very least reasonably question whether [Judge Barbier] had no involvement in such a high-profile and controversial matter." BIO 24-25.

Once again, other courts and distinguished jurists *categorically* reject that legal standard, holding instead that the "reasonable person" for purposes of 28 U.S.C. § 455(a) is one who equips himself with all of the information available on the record. Manifestly, when the record is uncontroverted, as it is in

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[7] Respondents' reliance on the overlapping defendants in this case and *Gilboy* is a straw-man that the Fifth Circuit did not adopt and that other circuits would similarly reject. The defendants overlap only because both cases are suits against the entire industry; more relevant is the fact that the *Gilboy* brief made no unique assertions regarding the overlapping defendants. In point of fact, a judge is not prohibited even from hearing a case involving a party against whom he litigated in private practice. See Pet. 23-24.

this case, there can be no perception of bias. See Pet. 18-24 (citing, *inter alia*, *El Fenix de Puerto Rico* v. *The M/Y Johanny*, 36 F.3d 136, 140 (CA1 1994) (disqualification improper when, notwithstanding conceivable inferences of bias, movant "challenge[d] none of the findings underlying the [district court's] recusal order"); *In re Drexel Burnham Lambert*, 861 F.2d 1307, 1313 (CA2 1988) (distinguishing "a straw poll of the only partly informed man-in-the-street" from proper inquiry into "record facts and the law" as viewed by "reasonable person knowing and understanding all the relevant facts"); *Microsoft Corp.* v. *United States*, 530 U.S. 1301, 121 S. Ct. 25, 26 (2000) (Rehnquist, C.J.) (test is "an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances")).[8]

Respondents also lack any persuasive answer to the important conflict created by the Fifth Circuit's "hold[ing] that a reasonable person might harbor doubts about the trial judge's impartiality, and thus the district court *abused its discretion* in denying the defendants' motion to recuse." Pet. App. 37a (emphasis added). Even treating the Fifth Circuit's unelaborated statement that a reasonable person "would" perceive bias as part of the court's legal standard (see BIO 30), not even *respondents* suggest that the Fifth Circuit required anything approaching a demonstration that Judge Barbier showed a "clear error of judgment" (*Datagate* v. *Hewlett-Packard Co.*, 941 F.2d 864, 871 (CA9 1991)), or that "the impropriety is clear and one

[8] Two related arguments raised by the BIO, neither of which the Fifth Circuit or any other court has accepted, require only brief comment. *First*, respondents' claim (BIO 25) that there is a heightened ground for disqualification based on *pro bono* activities, as opposed to paying work, remains befuddling and offensive to the better principles of the bar. Judges who have engaged in *pro bono* service are not less faithful to their oaths, and respondents' position would encompass innumerable charitable services. Furthermore, given that Judge Barbier never litigated a tobacco case in his career, it is silly to suggest that a reasonable observer would perceive him as an anti-tobacco activist. *Second, of course* Judge Barbier did not disavow the LTLA's position in the *Gilboy amicus* brief (*id.* 26), nor did he embrace it in any way. He consistently remained entirely neutral as to all of the questions presented by the case, just as the canons of judicial ethics require.

which would be recognized by all objective, reasonable persons" (*United States* v. *F. Lee Bailey*, 175 F.3d 966, 968 (CA11 1999)), much less that Judge Barbier's decision not to recuse himself "cannot be defended as a rational conclusion supported by [a] reasonable reading of the record" (*In re United States*, 666 F.2d 690, 695 (CA1 1981)). To the contrary, the Fifth Circuit reasoned that "this is a close case for recusal," but that whenever "the question of whether § 455(a) requires disqualification is a close one the balance tips in favor of recusal." Pet. App. 36a. In such a "close case," other circuits manifestly would hold that a judge did not "abuse his discretion" in declining to recuse himself.

B. The Decision Below Directly Implicates This Court's Supervisory Authority And Conflicts With This Court's Precedents.

Even if the decision below did not conflict with other circuits' interpretation of Section 455(a), certiorari would be warranted because the Fifth Circuit's holding is contrary to two of this Court's decisions and, by calling into question federal judges' fidelity to their oaths, calls for an exercise of this Court's supervisory authority over the federal courts.

The conflict with the holding of *Liteky* v. *United States*, 510 U.S. 540, 552 (1994), that Section 455(a) must not be construed "as implicitly eliminating a limitation explicitly set forth in § 455(b)" is manifest. See Pet. 14-16. Section 455(b)(2) addresses *precisely* the facts that the Fifth Circuit held mandate recusal here: the judge's relationship to (i) the case before the court, and/or (ii) the parties' lawyers. Respondents, however, offer only the *ipse dixit* that "[o]bviously * * * the grounds for recusal here go far beyond any 'specific aspect' addressed by § 455(b)." BIO 29. That is true only in the sense that, contrary to *Liteky*, the Fifth Circuit required disqualification in circumstances that go "far beyond" anything Congress contemplated – *viz.*, where the prior case is *not* "the matter [now] in controversy" (§ 455(b)(2)), where the judge did *not* "serve[] as [a] lawyer" in that matter (*id.*), and where the judge did *not* "previously practice[] law" with one of the attorneys before him (*id.*).

The decision below also conflicts with *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847 (1988). Invoking *Liljeberg*'s holding that disqualification may be appropriate even if the judge is not presently aware of facts creating a serious impropriety (486 U.S. at 860-61), respondents try to defend the Fifth Circuit's rule that disqualification is required if the public might believe things that indisputably *are not true* (such as that Judge Barbier participated in the *Gilboy* brief) (see BIO 27). That is ridiculous – *Liljeberg* reasons that disqualification turns on an objective inquiry into the actual "*facts* creating an appearance of impropriety" (486 U.S. at 860 (emphasis added)), which the Fifth Circuit eschewed (see *supra* at 7). This Court's holding merely "called upon [the judge] to rectify an oversight," not to "perform the impossible." 486 U.S. at 861. Moreover, Judge Barbier's failure to disqualify himself was, at most, harmless and thus not subject to reversal. 486 U.S. at 862. The "harm" respondents allege – that the district judge to which this case was reassigned did not remand but instead waited for the cases to be consolidated, and that courts have dismissed foreign tobacco cases that rest on *federal law* theories (BIO 28) – are immaterial in this context. The relevant point is that, while Judge Barbier is supposedly perceived as biased in deciding *the merits* of tobacco litigation, the only issue he ever decided was the wholly *procedural* question whether (i) to remand the case to state court, or instead (ii) to wait potentially to permit some other judge to decide whether to remand it. Indeed, as noted (see *supra* at 1) the transferee judge later *agreed* with Judge Barbier's remand ruling.[9]

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, certiorari should be granted.

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[9] Respondents' assertions of "waiver" (BIO 27, 29 n.*) are misguided. *Liljeberg* discussed "harmless error" as a means of construing § 455, not as a distinct doctrine that would have to be separately asserted (compare Fed. R. Civ. P. 61). All the proceedings on appeal in this case and *Panama* related to the construction of § 455, and a party is not prevented from citing additional cases in this Court.

Respectfully submitted,

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February 6, 2002

CHRONOLOGY OF EVENTS CITED BY RESPONDENTS

10/6/98	*Panama* suit re-filed in Louisiana state court
11/5/98	*Panama* defendants remove to E.D. La.; assigned to Barbier, J.
12/3/98	*Panama* plaintiff moves to remand
1/5/99	*Panama* defendants move to recuse Barbier, J.
2/3/99	Barbier denies motion to recuse in *Panama*
2/16/99	Respondents request MDL consolidation of six foreign tobacco suits, including *Panama*
2/23/99	*Panama* defendants oppose remand and seek stay
3/1/99	S.D. Tex. *sua sponte* transfers *Bolivia* suit to D.D.C.
3/17/99	Barbier holds argument on motions for remand and stay in *Panama*
4/28/99	S.D. Fl. stays proceedings in *Venezuela* pending MDL ruling as a matter of discretion (1999 U.S. Dist. LEXIS 22742)
5/21/99	MDL hears argument on consolidation motion
5/28/99	Barbier denies motion for stay and grants remand in *Panama*
6/10/99	MDL panel transfers suits pending in federal courts to D.D.C., explicitly excluding *Panama* (1999 U.S. Dist. LEXIS 8803)
12/10/99	S.D. Fl. stays *Goias* suit
12/30/99	D.D.C. dismisses federally filed *Guatemala*, *Nicaragua*, and *Ukraine* suits (83 F. Supp. 2d 125)
2/9/00	*Sao Paulo* suit filed in state court
3/24/00	*Sao Paulo* defendants remove to E.D. La.; assigned to Barbier, J.
4/7/00	On defendants' request, MDL Clerk issues conditional transfer order in *Sao Paulo*
4/24/00	MDL Panel stays its conditional transfer order in *Sao Paulo*

5/25/00	Barbier denies motion for stay and grants remand in *Sao Paulo* based on prior *Panama* ruling (Pet. App. 40a)
6/12/00	D.D.C. grants remand in four suits, including *Venezuela*, endorsing Barbier's *Panama* and *Sao Paulo* decisions (100 F. Supp. 2d 31)
7/17/00	CA5 reverses denial of recusal motion in *Panama* (Pet. App. 29a; 217 F.3d 343)
11/2/00	*Panama* transferred by MDL panel to D.D.C.
1/22/01	CA5 refuses to reverse remand order in *Rio de Janeiro* (239 F.3d 714)
5/14/01	CA5 reverses denial of recusal motion in *Sao Paulo* (Pet. App. 17a; 250 F.3d 315)
5/22/01	C.A.D.C. affirms dismissal of federally filed *Guatemala*, *Nicaragua*, and *Ukraine* suits (249 F.3d 1068)
9/5/01	CA5 denies rehearing *en banc* in *Sao Paulo* (Pet. App. 1a; 265 F.3d 299)
10/16/01	C.A.D.C. holds oral argument on *Venezuela* defendants' motion for mandamus to reverse D.D.C.'s remand order
11/14/01	*Sao Paulo* transferred by MDL panel to D.D.C.
12/13/01	D.D.C. stays proceedings in *Sao Paulo*

Per Curiam

SUPREME COURT OF THE UNITED STATES

SAO PAULO STATE OF THE FEDERATIVE REPUBLIC OF BRAZIL *v.* AMERICAN TOBACCO CO., INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 01–835. Decided April 1, 2002

PER CURIAM.

Section 455(a) of 28 U. S. C. (1994 ed.) provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." In this tobacco-products liability case, the Court of Appeals for the Fifth Circuit held that §455(a) required disqualification of a District Judge whose name appeared erroneously, prior to his appointment to the bench, on a motion to file an *amicus* brief in a similar suit against some of the same defendants. *Republic of Panama* v. *American Tobacco Co.*, 250 F. 3d 315 (2001) *(per curiam) (Republic of Panama II)*. We grant the writ of certiorari and reverse.

Petitioner, Sao Paulo State, brought this suit against respondent tobacco companies in Louisiana state court. It alleged that respondents had conspired to conceal the health risks of smoking, thereby preventing it from adopting policies that would have reduced smoking by Sao Paulo citizens. It seeks compensation for the costs of treating their smoking-related health problems. The suit was removed to the United States District Court for the Eastern District of Louisiana and assigned to District Judge Carl J. Barbier, who had presided over a companion case, *Republic of Panama* v. *American Tobacco Co.*, No. 98–3279, 1999 WL 350030 (ED La., May 28, 1999) *(Republic of Panama I)*, vacated and remanded, 217 F. 3d 343 (CA5 2000). As in that case, respondents filed a motion seeking Judge Barbier's recusal under §455(a) because of his involvement, prior to appointment to the bench, in a

similar suit against some of the respondents.

Almost nine years before the present suit was commenced, Judge Barbier's name appeared on a motion to file an *amicus curiae* brief in *Gilboy* v. *American Tobacco Co.*, 582 So. 2d 1263 (La. 1991). The motion was submitted by the Louisiana Trial Lawyers Association (LTLA), and erroneously listed Judge Barbier as the association's president, a position from which he had retired about six months earlier. The motion also correctly listed as a member of the LTLA's *amicus curiae* committee which approved the brief, Michael St. Martin, who represents petitioner in the case before us. The *amicus* brief itself—which did not list either Judge Barbier or Mr. St. Martin—supported the *Gilboy* plaintiff's claim that cigarettes are addictive and cause cancer, and that the defendants failed to warn consumers about these dangers. Brief for LTLA as *Amicus Curiae* in No. 90–C–2686 (La. Sup. Ct.), App. to Brief in Opposition 9a; *Gilboy*, *supra*, at 1266.

Respondents argued that Judge Barbier's association with the *Gilboy amicus* brief created an "appearance of partiality" requiring disqualification under §455(a). Brief in Opposition 3. Judge Barbier disagreed. Adopting his reasons for denying recusal in *Republic of Panama I*, he refused to disqualify himself because his name appeared in error on the motion to file the *amicus* brief and because he took no part in preparation or approval of the brief. Minute Entry in Civ. Action Nos. 00–0922, 98–3279 (ED La., May 26, 2000), App. to Pet. for Cert. 43a; Tr. of Proceeding on Motion for Recusal in *Republic of Panama I*, pp. 21, 37–40 (Feb. 3, 1999), App. to Pet. for Cert. 48a–51a (Tr. of Proceeding). Indeed, he was previously unaware of it, which he found unsurprising because the LTLA affixed the president's name to all motions to file *amicus* briefs, despite the fact that the president had absolutely no role in preparation or approval of the briefs. Tr. of Status Conf. in *Republic of Panama I*, pp. 7–8 (Dec. 21, 1998),

App. to Pet. for Cert. 53a (Tr. of Status Conf.); Tr. of Proceeding 37–40, App. to Pet. for Cert. 49a–51a. Judge Barbier also noted in *Republic of Panama I* that he had never practiced law with Mr. St. Martin or any other lawyer listed on the motion, had no personal knowledge of the disputed facts in *Gilboy*, had never taken a position with respect to any of the issues raised in petitioner's suit, and had never been involved in a tobacco-related case "one way or another in my whole legal career." Tr. of Status Conf. 9, App. to Pet. for Cert. 54a. See also Tr. of Proceeding 39–40, App. to Pet. for Cert. 50a–51a.

The Court of the Appeals for the Fifth Circuit reversed, citing its prior decision reversing Judge Barbier's order denying recusal in *Republic of Panama I*. In that case, the Fifth Circuit said:

> "The fact that Judge Barbier's name was listed on a motion to file an amicus brief which asserted similar allegations against tobacco companies to the ones made in this case may lead a reasonable person to doubt his impartiality. Also, Judge Barbier was listed on this filing with the attorney who is currently representing the Republic of Panama. The trial judge's assertions that he did not participate directly in the writing or researching of the amicus brief do not dissipate the doubts that a reasonable person would probably have about the court's impartiality. We acknowledge that this is a close case for recusal." 217 F. 3d, at 347.

Judge Parker concurred, agreeing that the court was bound by its decision in *Republic of Panama I*, but arguing that that decision was "erroneous because it requires recusal on the basis of a judge's public statements on the law made prior to becoming a judge . . . ." *Republic of Panama II*, 250 F. 3d, at 318. Rehearing en banc was denied over the dissent of six judges, who argued that the

decision below amounts to an "issue recusal" rule, requiring disqualification whenever a judge has pre-judicial association with a legal position. 265 F. 3d 299, 306 (2001) (joint dissent of Wiener and Parker, JJ.).

We need not consider the argument advanced by the dissenting judges, since this case is easily disposed of on other grounds. The Fifth Circuit's decision is inconsistent with *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U. S. 847 (1988), which stated that §455(a) requires judicial recusal "if a reasonable person, *knowing all the circumstances*, would expect that the judge would have actual knowledge" of his interest or bias in the case. 486 U. S., at 861 (internal quotation marks omitted and emphasis added). The Fifth Circuit reached the conclusion that recusal was required because it considered what a reasonable person would believe *without* knowing (or giving due weight to the fact) that the judge's name was added mistakenly and without his knowledge to a *pro forma* motion to file an *amicus* brief in a separate controversy. Although Judge Barbier was indeed a leader of the LTLA at that time (he was member of the association's executive committee), he took no part in the preparation or approval of the *amicus* brief; indeed, he was only "vaguely aware" of the case. Tr. of Status Conf. 8, App. to Pet. for Cert. 54a. The decision whether his "impartiality might reasonably be questioned" should not have been made in disregard of these facts; and when they are taken into account we think it self-evident that a reasonable person would not believe he had any interest or bias.

Accordingly, we grant the petition for certiorari, reverse the judgment of the Court of Appeals, and remand the case for proceedings consistent with this opinion.

It is so ordered.